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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 138

IDLEWILD BON VOYAGE LIQUOR CORPORATION, PETITIONER,

vs.

MARTIN C. EPSTEIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 139 Misc.

IDLEWILD BON VOYAGE LIQUOR CORPORATION, PETITIONER,

vs.

HONORABLE ALEXANDER BICKS ET AL., JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

ON PETITION FOR WRIT OF MANDAMUS

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF CERTIORARI FILED JUNE 7, 1961

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF CERTIORARI GRANTED OCTOBER 9, 1961

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APPENDIX

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civil 2902

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

Plaintiff.

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Defendants.

Plaintiff, for its complaint herein, alleges:

1. This action arises under Article I, Section 8, Clause 3 (interstate and foreign commerce clause) and Article I, Section 10, Clause 2 (import, export clause) of the Constitution of the United States, and under Section 311 of the Tariff Act of 1930 [19 U. S. C. §1311], and Sections 5521 and 5522 of Title 26 U. S. C., the Internal Revenue Code, as hereinafter more fully appears. This action is for an injunction pursuant to the provisions of Sections 2281 and 2284 of Title 28 U. S. C. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

2. At all times hereinafter mentioned plaintiff was and still is a corporation duly organized and existing under the laws of the State of New York, having its principal place of business at Arrivals Building, New York International Airport, Jamaica, Queens County, New York.

3. The defendant Thomas E. Rohan is the Chairman of the State Liquor Authority, an administrative agency of the State of New York created under Article 2 of the Alcoholic Beverage Control Law of the State of New York, and resides at 158-18 Riverside Drive West, in the Borough of Manhattan, City, County and State of New York, within the Southern District of New York, and has an office for the transaction of business of the Authority at 270 Broadway, in the Borough of Manhattan, City, County and State of New York, within said District. The defendants Martin C. Epstein, William H. Morgan, Grant F. Daniels and Samuel M. Birnbaum are members and commissioners of the said State Liquor Authority.

4. Plaintiff's operations hereinafter described are conducted in the Arrivals Building at New York International Airport at Idlewild in the Borough of Queens, City and State of New York, under an Agreement of Lease dated October 31, 1956, made to it, as lessee, by The Port of New York Authority, as lessor. The lease provides that the premises may be used by the plaintiff, and they are so used, solely for an office in connection with the sale for export to foreign countries by the plaintiff of in-bond wines and liquors.

Plaintiff is using, and is required to use, such premises solely for an office in connection with the receipt of paid orders for export by the plaintiff of United States Customs bonded wines and liquors, which are free of United States and New York State taxes, to foreign countries only and

not for use in the State of New York, or in any other State, Territory or Possession of the United States.

The leased premises have been approved by and are in the custody and under the supervision and control of the United States Bureau of Customs both as regards the initial construction and security of the space and as regards its constant and continuing supervision and the accountability of plaintiff for all wines and liquors exported under Customs Regulations adopted pursuant to the authority of the Tariff Act of 1930 as amended. Such wines and liquors are at all times in the custody of the Bureau and are kept under lock and key in these premises and are entered in and withdrawn from these premises on Bureau of Customs documents and forms and under its supervision and control.

The bonded wines and liquors exported by plaintiff are purchased for such purpose by plaintiff solely from various suppliers while in bond and withdrawn for export only by plaintiff exclusively from Class 6 United States Government bonded manufacturing and United States Customs bonded warehouses, where they are located, for rewarehousing at the United States Customs controlled space of the plaintiff in such leased premises under such Customs Regulations. Plaintiff is required to keep, and does keep, full records and receipts on United States Customs approved forms governed by such Regulations for the disposition of each and every bottle withdrawn.

Each bottle is required by Section 5301 of the Internal Revenue Code and by the provisions of Regulations 26, Code of Federal Regulations, Part 201, Section 201.467, adopted thereunder and to which reference is hereby made, to be labeled with an export label "Bottled for export from the U. S. A.", the use of which label for domestic purposes or purposes other than export is rendered illegal by applicable federal laws and regulations.

The bonded, tax-free wines and liquors manufactured and stored exclusively in such bonded warehouses, purchased from the suppliers for export only and sold by the plaintiff from its leased premises for export solely, remain at all times in the constant and continuous custody, control and supervision of the United States Treasury Department, Bureau of Customs, under Regulations adopted pursuant to Section 311 of the United States Tariff Act of 1930 [19 U. S. C. §1311], as amended, which are designed to, and do, insure against the diversion of the wines and liquors for use in the State of New York or elsewhere in the United States and which continuously insure the export thereof to foreign countries. The elaborate and exhaustive precautionary measures contained in the Regulations which provide such continuous custody and supervision of the wines and liquors and of plaintiff's operations by the United States Customs Bureau and its officials (a) while in such bonded warehouses, (b) during transshipment therefrom to the premises leased by plaintiff, (c) while in said premises, and (d) during transportation to and loading on the carrier and down to the moment of departure, are contained in the Code of Federal Regulations, Title 19, ch. 1, Parts 18 and 19, and in Regulations adopted pursuant to the applicable provisions of the Internal Revenue Code above referred to, reference to which is hereby made.

None of the wines and liquors sold by the plaintiff have been or can be diverted to use in the State of New York or elsewhere in the country. Class 6 bonded warehouses and United States Customs bonded warehouses are designed exclusively for the storage in bond of wines and liquors, tax free, solely for exportation and are the only classes of warehouses in which these articles, once they have been placed therein, are irrevocably destined for export and from which they cannot ever be legally withdrawn for domestic use or sale or enter domestic commerce even

upon tender of taxes and duties, and such Tariff Act and Regulations have been so construed by the Treasury Department, Bureau of Customs, the Federal agency charged with their administration and enforcement. Such products constitute exports from the moment they are placed in such warehouses.

Orders for the purchase of such wines and liquors are received by plaintiff, and paid for at plaintiff's office in the leased premises, from passengers exclusively for export to such passengers departing solely by non-stop planes from the Airport to foreign countries only. The wines and liquors so exported are delivered by plaintiff pursuant to said Customs Regulations under Customs supervision to the airlines only, and not to the purchasers or passengers, on approved documents for foreign export with delivery to the passengers to be made only at the foreign destination of the passengers subject, as aforesaid, to the continuing supervision and control, under said Regulations, of the Bureau of Customs, which certifies that the goods were laden for export.

The operations of the plaintiff are intended and employed for the benefit primarily of Economy Fare passengers of moderate means who constitute the majority of the pasengers departing from the New York International Airport at Idlewild. Plaintiff's average sales consist of one bottle per passenger since most European countries by law permit only one such bottle to be so imported duty-free. Thus a passenger going abroad who normally would pay approximately $7 for a bottle of liquor in most sections of Europe is enabled by plaintiff's operations to have exported and delivered to him abroad a single bottle purchased from plaintiff at a cost of approximately $3.

Such privilege afforded by plaintiff's operations to international travelers (a) encourages foreign travel by nationals of the United States and of all foreign countries

since it is a privilege reciprocal to that granted in foreign countries to passengers bound for the United States who are permitted to purchase a limited quantity of liquor abroad and to import such liquor into the United States free of United States duties and United States and New York taxes, and (b) opens new markets for the export of American liquors and thus assists in stimulating foreign trade therein in accordance with the statutory Congressional economic policy hereinafter set forth.

5. The entire plan of plaintiff's operations and procedures as set forth above in paragraph 4 of this complaint has been approved by the United States Bureau of Customs.

6. The United States Treasury Department, Bureau of Customs, has ruled that these transactions constitute exports to foreign countries of such bonded, tax-free wines and liquors within the meaning of Section 311 of the United States Tariff Act of 1930 as amended [19 U. S. C. §1311]. A copy of that ruling and section is annexed hereto as Exhibit A. The United States Treasury Department, Bureau of Customs, has accordingly declared, pursuant to the authority vested in it by law and regulations, that such transactions constitute exports and are exempted by law from all Federal excise taxes and duties on the wines and liquors exported.

7. Defendants, acting upon an opinion of the Attorney General of the State of New York, dated June 30, 1960 (a copy of which is annexed hereto as Exhibit B), have advised plaintiff that they have determined that plaintiff's operations set forth above in paragraph 4 of this complaint are illegal as in violation of Section 3, subdivision 28, Section 62, and Section 100, subdivisions 1 and 2, of the

Alcoholic Beverage Control Law of the State of New York, because the transactions between plaintiff and its suppliers and plaintiff and the purchasers of said bonded, tax-free wines and liquors constitute sales within the State of New York which cannot be made without obtaining appropriate license. The defendants concede, and it is a fact, that the Alcoholic Beverage Control Law makes no provision for licensing operations such as those carried on by the plaintiff. A copy of a letter embodying such determination, dated July 11, 1960, is annexed hereto as Exhibit C. It is further a fact, and the New York State Department of Taxation has ruled, that under the Tax Law of the State of New York, Section 424(f), the State of New York is without power to tax plaintiff's transactions in these tax-free wines and liquors. A copy of the applicable provisions of said section and of such ruling, dated August 2, 1954, is annexed hereto as Exhibit D.

8. Defendants have further determined, and have advised plaintiff of such determination, that Section 3, subdivision 28, Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York (copies of which are annexed as Exhibit E), prohibit and make unlawful and a crime plaintiff's operations aforesaid, including both plaintiff's purchases for export from its suppliers and plaintiff's sales for export. Defendants have further threatened to enforce, and will, unless restrained by this Court, enforce, or endeavor to enforce such determination by restraining or endeavoring to restrain and prohibit plaintiff's operations and by subjecting plaintiff to civil and criminal proceedings to enforce and carry out their determination, all to the great and irreparable damage of the plaintiff.

9. As a result of defendants' acts as aforesaid, the New York Importers and Distillers Association, Inc. has already circularized its many members, consisting of the largest distillers and exporters of bonded liquor in this country, including those from which plaintiff purchases bonded, tax-free wines and liquors for export to foreign countries, advising such members not to fill plaintiff's orders or to sell to the plaintiff bonded, tax-free wines and liquors for such export because of the defendants' determination that plaintiff's operations are in violation of the above-mentioned sections of the Alcoholic Beverage Control Law of the State of New York and that such sales to the plaintiff are not within the scope of wholesalers' licenses under Section 62 of such law.

10. As a result of defendants' acts as aforesaid, plaintiff will, unless defendants are enjoined by this Court, suffer the loss and forfeiture of its valuable lease which is conditioned on the continuance of plaintiff's operations, or the loss of the right of possession thereunder, while remaining liable for the rental under such lease, and will further sustain great and irreparable injury and damage in that it will be compelled to cease its operations, and its business, valued well in excess of $1,000,000, will be destroyed and the plaintiff and its officers will be subjected to fines or criminal penalties pursuant to Section 130 of the Alcoholic Beverage Control Law.

11. Section 3, subdivision 28, Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, in so far as they require plaintiff to obtain a license to carry on the operations set forth in paragraph 4 of this complaint or prohibit or render such operations unlawful or criminal are unconstitutional

and void as repugnant to the provisions of Article I, Section 8, Clause 3 and Article I, Section 10, Clause 2 of the Constitution of the United States for the following reasons, among others:

(a) The Tariff Act of 1930, as amended and the Regulations adopted thereunder, taken in conjunction with the provisions of the applicable Internal Revenue Code, including Title 26 U. S. C., Sections 5521 and 5522, together constitute, and have been construed by the Supreme Court and the courts of the State of New York to constitute, a comprehensive, exclusive and preemptive scheme duly adopted by Congress for the regulation, encouragement and promotion of foreign commerce in, and exports of, bonded wines and liquors, which are thereby and for that purpose exempted from all taxes and duties, including State taxes, under the powers vested exclusively in Congress under the Commerce Clause of the Federal Constitution, Article I, Section 8, Clause 3, and under Article I, Section 10, Clause 2 thereof, which commands that no state shall without consent of Congress lay any imposts or duties on imports or exports, and under Article VI, Clause 2 thereof making the "Constitution and laws of the United States which shall be made in pursuance thereof • • • the supreme law of the land."

Plaintiff's operations fall directly within the scope and purpose of this Congressional economic statutory policy for the development, by means of such tax exemption, of foreign markets for American liquors by enabling them to compete abroad with similar foreign products.

(b) These Regulations and the continuous custody, supervision and control of plaintiff's opera-

tions by the United States Treasury Department, Bureau of Customs, insure that the bonded, tax-free wines and liquors are irrevocably destined for export to foreign countries only and cannot ever be, and are not, diverted to use in the State of New York or elsewhere in the United States, and cannot and do not enter domestic commerce.

(c) Under plaintiff's operations governed by these Regulations of the Treasury Department, Bureau of Customs, as aforesaid, there is an assured continuous and uninterrupted movement of such bonded, tax-free wines and liquors in foreign commerce for export to foreign countries. Upon delivery thereof to the airlines in non-stop transoceanic aircraft such liquors and wines cannot be relanded in the United States or otherwise enter domestic commerce. Such bonded, tax-free wines and liquors are in the actual possession and custody of the United States Government, never have become and never can become a part of the mass of property within the State of New York, and are not legally within the State. The State of New York never has acquired and never can acquire jurisdiction thereof for the purpose of prohibiting their purchase and sale for export and their export and transportation in foreign commerce or of requiring license therefor, or rendering the same unlawful and subject to civil and criminal sanctions. Since the State of New York has no power under the Federal Constitution to tax exports thereof to foreign countries, *a fortiori* it has no power to prohibit them or to render them illegal and criminal, nor any power to prohibit and obstruct foreign commerce therein.

(d) Neither are any of the above powers conferred on the State of New York by the Twenty-First Amendment to the Federal Constitution which provides that "the transportation or importation into any State, Territory or Possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited" for the reasons, among others, that there has been and can be under plaintiff's said operations no transportation or importation of plaintiff's bonded, tax-free wines and liquors for delivery or use in the State of New York, nor would that State possess, by virtue of such Amendment, the power to prohibit altogether such importation even if such an importation had taken place. Further, Congress by the adoption of the Tariff Act of 1930 and the applicable provisions of the Internal Revenue Code and applicable regulations thereunder, has fully preempted the whole field of such liquor exports, and purchases and sales for export, and their custody, regulation, control and supervision under the Commerce Clause of the Federal Constitution, and any attempt by the State of New York to license, regulate or prohibit plaintiff's transactions in such wines and liquors is in direct conflict with such Federal regulation.

12. The acts of the defendants create an existing dispute between the parties as to plaintiff's present legal rights amounting to a justiciable controversy which plaintiff is entitled to have determined in this action on the merits by a three-judge court under 28 U. S. C., Section 2281, which plaintiff requests be impaneled for the determination of this controversy.

13. Plaintiff is entitled to maintain this action and to obtain the relief therein requested from this Court, and cannot be required to have recourse for such relief to the Courts of the State of New York, even assuming, contrary to the facts, that the latter have jurisdiction to grant such relief and that the State statutes afford plaintiff an adequate remedy in such Courts, for the following reasons:

The Federal rights for which plaintiff asks the protection of this Court in this action are based solely upon the provisions of the Federal Constitution and on the comprehensive, exclusive and preemptive Federal statutory scheme outlined above (with which the State statute and the defendants' acts here are in direct conflict) for the encouragement, protection and regulation of foreign trade in, and export of, tax-free bonded wines and liquors and upon specific paramount considerations of Federal (not State) policy which can only be adequately, properly and fully determined and protected by a Federal Court.

Denial of plaintiff's right of access to this Court would deprive plaintiff of its right to a prompt and expeditious determination of the Federal issues involved. Such denial would subject the plaintiff to the added unnecessary delay and expense of a costly, protracted and futile litigation through all the courts of the State, only to be finally resolved in the end by a decision of the United States Supreme Court.

14. Plaintiff has in fact and in law neither any administrative remedy under the Alcoholic Beverage Control Law of the State of New York nor any adequate remedy in its Courts because Section 121 of that Act (a copy of which is annexed as Exhibit F) not only excludes the defendants' acts above set forth from review by its Courts, but in all cases where any such review is allowed confines the granting of any stay pending such review to a period not exceeding thirty days.

15. Plaintiff has no plain, adequate or complete remedy at law.

WHEREFORE, complainant prays:

A. That this Court hold and adjudge that as applied to the plaintiff, Section 3, subdivision 28, and Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, and all other provisions of said Law which defendants might claim would affect plaintiff's operations, are unconstitutional and void as being contrary to Article I, Section 8, Clause 3 of the Constitution of the United States, which provides that Congress shall have the power to regulate commerce with foreign nations.

B. That this Court hold and adjudge that as applied to the plaintiff, Section 3, subdivision 28, and Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, and all other provisions of said law which defendants might claim would affect plaintiff's operations, are unconstitutional and void as being contrary to Article I, Section 10, Clause 2 of the Constitution of the United States which prohibits a state, without the consent of Congress, from laying any imposts or duties on imports or exports, and as being in violation of Section 311 of the Tariff Act of 1930 [19 U. S. C. §1311] and of the provisions of the applicable Internal Revenue Code.

C. That this Court issue an injunction, both preliminary and permanent, enjoining the defendants, and each of them, from enforcing or attempting to enforce against the plaintiff and from putting or attempting to put into execution as against it Section 3, subdivision 28, and Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, and all other provisions of said Law which the defendants might claim would affect plaintiff's operations, either by

invoking or attempting to invoke its civil or criminal sanctions or otherwise.

D. That complainant have such other and further relief in the premises as may be just and proper.

KELLY AND SCHWARTZ
By JOHN F. KELLY
Member of Firm
Office and P. O. Address:
1780 Broadway
New York 19, New York

State of New York, }
County of New York, } ss.:

ARTHUR GILIOTTI, being duly sworn, deposes and says: That he is the President of Idlewild Bon Voyage Liquor Corporation, the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

ARTHUR GILIOTTI

Sworn to before me this
22nd day of July, 1960.

DONALD L. PRICE
Notary Public, State of New York
No. 24-8439300
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1962

Exhibit A Annexed to Complaint

(Ruling of Treasury Department, Bureau of Customs, and Section 311 of Tariff Act of 1930 [19 U. S. C. §1311])

[LETTERHEAD OF]

TREASURY DEPARTMENT
BUREAU OF CUSTOMS
Washington 25

In reply refer to
DB 235
Your file:
FBL:VW:19.15

Dear Mr. Dill:

We refer to your letter of March 10, 1958, concerning the proposal of the Idlewild Bon Voyage Liquor Corporation for the withdrawal of liquor from class 6 bonded manufacturing warehouses for rewarehousing in the company's locker at Idlewild Airport and subsequent sale to foreign-bound airline passengers, free of duty and tax. You state that under the proposed procedure final delivery of the liquor will be made by flight personnel of the plane after departure from the United States.

In a letter dated December 27, 1957, to John F. Kelly, attorney for the Idlewild Bon Voyage Liquor Corporation, the proposal of the applicant was rejected under the theory that delivery of the liquor to the passengers in flight did not meet the requirements of section 311, Tariff Act of 1930, as amended. A copy of this letter was furnished to your office.

Exhibit A Annexed to Complaint

The applicant has now modified its proposal to the extent that the liquor will be delivered to the airline on approved documents for export with delivery to the passenger to be made only at the foreign destination of the passenger.

We believe that delivery of the liquor to the passenger after he has reached his port of debarkation would be an exportation of the merchandise within the meaning of section 311 of the tariff act. Therefore, with the distinct understanding that the liquor will be so delivered, the procedure proposed by the applicant is approved.

Very truly yours,

(Signed) D. B. STRUBINGER
Acting Commissioner of Customs

Hon. Robert W. Dill
Collector of Customs
New York 4, New York

Exhibit A Annexed to Complaint

§1311. Bonded manufacturing warehouses.

All articles manufactured in whole or in part of imported materials, or of materials subject to internal-revenue tax, and intended for exportation without being charged with duty, and without having an internal-revenue stamp affixed thereto, shall, under such regulations as the Secretary of the Treasury may prescribe, in order to be so manufactured and exported, be made and manufactured in bonded warehouses similar to those known and designated in Treasury Regulations as bonded warehouses, class six: *Provided,* That the manufacturer of such articles shall first give satisfactory bonds for the faithful observance of all the provisions of law and of such regulations as shall be prescribed by the Secretary of the Treasury: *Provided further,* That the manufacture of distilled spirits from grain, starch, molasses, or sugar, including all dilutions or mixtures of them or either of them, shall not be permitted in such manufacturing warehouses.

Whenever goods manufactured in any bonded warehouse established under the provisions of the preceding paragraph shall be exported directly therefrom or shall be duly laden for transportation and immediate exportation under the supervision of the proper officer who shall be duly designated for that purpose, such goods shall be exempt from duty and from the requirements relating to revenue stamps.

No flour, manufactured in a bonded manufacturing warehouse from wheat imported after ninety days after June 17, 1930, shall be withdrawn from such warehouse for exportation without payment of a duty on such imported wheat equal to any reduction in duty which by treaty will apply in respect of such flour in the country to which it is to be exported.

Exhibit A Annexed to Complaint

Any materials used in the manufacture of such goods, and any packages, coverings, vessels, brands, and labels used in putting up the same may, under the regulations of the Secretary of the Treasury, be conveyed without the payment of revenue tax or duty into any bonded manufacturing warehouse, and imported goods may, under the aforesaid regulations, be transferred without the exaction of duty from any bonded warehouse into any bonded manufacturing warehouse; but this privilege shall not be held to apply to implements, machinery, or apparatus to be used in the construction or repair of any bonded manufacturing warehouse or for the prosecution of the business carried on therein.

Articles or materials received into such bonded manufacturing warehouse or articles manufactured therefrom may be withdrawn or removed therefrom for direct shipment and exportation or for transportation and immediate exportation in bond to foreign countries or to the Philippine Islands under the supervision of the officer duly designated therefor by the collector of the port, who shall certify to such shipment and exportation, or ladening for transportation, as the case may be, describing the articles by their mark or otherwise, the quantity, the date of exportation, and the name of the vessel: *Provided*, That the by-products incident to the processes of manufacture, including waste derived from cleaning rice in bonded warehouses under the Act of March 24, 1874, in said bonded warehouses may be withdrawn for domestic consumption on the payment of duty equal to the duty which would be assessed and collected by law if such waste or by-products were imported from a foreign country: *Provided*, That all waste material may be destroyed under Government supervision. All labor performed and services rendered under these provisions shall be under the supervision of a duly designated officer of the customs and at the expense of the manufacturer.

Exhibit A Annexed to Complaint

A careful account shall be kept by the collector of all merchandise delivered by him to any bonded manufacturing warehouse, and a sworn monthly return, verified by the customs officers in charge, shall be made by the manufacturer containing a detailed statement of all imported merchandise used by him in the manufacture of exported articles.

Before commencing business the proprietor of any manufacturing warehouse shall file with the Secretary of the Treasury a list of all the articles intended to be manufactured in such warehouse, and state the formula of manufacture and the names and quantities of the ingredients to be used therein.

Articles manufactured under these provisions may be withdrawn under such regulations as the Secretary of the Treasury may prescribe for transportation and delivery into any bonded warehouse at an exterior port for the sole purpose of immediate export therefrom: *Provided*, That cigars manufactured in whole of tobacco imported from any one country, made and manufactured in such bonded manufacturing warehouses, may be withdrawn for home consumption upon the payment of the duties on such tobacco in its condition as imported under such regulations as the Secretary of the Treasury may prescribe, and the payment of the internal-revenue tax accruing on such cigars in their condition as withdrawn, and the boxes or packages containing such cigars shall be stamped to indicate their character, origin of tobacco from which made, and place of manufacture.

The provisions of section 1351 of Title 26 shall, so far as may be practicable, apply to any bonded manufacturing warehouse established under this chapter and to the merchandise conveyed therein.

Exhibit A Annexed to Complaint

Distilled spirits and wines which are rectified in bonded manufacturing warehouses, class six, and distilled spirits which are reduced in proof and bottled in such warehouses, shall be deemed to have been manufactured within the meaning of this section, and may be withdrawn as hereinbefore provided, and likewise for shipment in bond to Puerto Rico, subject to the provisions of this section, and under such regulations as the Secretary of the Treasury may prescribe, there to be withdrawn for consumption or be rewarehoused and subsequently withdrawn for consumption: *Provided*, That upon withdrawal in Puerto Rico for consumption, the duties imposed by the customs laws of the United States shall be collected on all imported merchandise (in its condition as imported) and imported containers used in the manufacture and putting up of such spirits and wines in such warehouses: *Provided further*, That no internal-revenue tax shall be imposed on distilled spirits and wines rectified in class six warehouses if such distilled spirits and wines are exported or shipped in accordance with the provisions of this section, and that no person rectifying distilled spirits or wines in such warehouses shall be subject by reason of such rectification to the payment of special tax as a rectifier. (June 17, 1930, c. 497, Title III, §311, 46 Stat. 691; June 26, 1936, c. 830, Title IV, §404, 49 Stat. 1960.)

Exhibit B Annexed to Complaint

(Opinion of Attorney General of the State of New York, Dated June 30, 1960)

[LETTERHEAD OF]

STATE OF NEW YORK
DEPARTMENT OF LAW
Albany

Louis J. Lefkowitz
Attorney General

June 30, 1960

State Liquor Authority
270 Broadway
New York, N. Y.
Attention Hyman Amsel, Esq., Counsel

Dear Sirs:

You have by letter of April 22, 1960, supplemented by letter of May 9, 1960, requested my opinion whether the transactions you describe in your request constitute a sale under the Alcoholic Beverage Control Law, and thus require a license from the State Liquor Authority. You further ask what type of license is required, if any.

As set forth in your letter of inquiry, the facts are that Idlewild Bon Voyage Liquor Corporation is a New York corporation and lessee under lease from the New York Port Authority of space 16 feet wide and 30 feet 4 inches in depth on the second floor of the new Arrivals building at New York International Airport, Idlewild. The lessee proposes to use the front portion of the space as an office where orders for liquor will be taken for a

passenger departing by plane from the United States, and where payment will be made therefor. A portion of the leased space will be used for storage and display of the liquor (purchased by the corporation from suppliers from stock held by the suppliers in bond) and will remain under bond and under supervision of the Bureau of Customs at all times until delivery to the airplane. The liquor is to be shipped by the lessee from the United States on the plane on which the passenger departs, but is not to be delivered to the passenger until he reaches his foreign destination. Shipment is to be on documents approved for export by the Federal Government. The United States Bureau of Customs has indicated that it treats this transaction as an export within the meaning of §311 of the Tariff Act of 1930.

It is my opinion that under the present provisions of the Alcoholic Beverage Control Law, this transaction constitutes a "sale" or "selling" within the State of New York. The definitions of "sale" and "selling" under this statute are broad and appear to cover the soliciting and receiving of an order, such as is here involved, even though delivery is not made within the State. The provision is as follows (Alcoholic Beverage Control Law §3[28]):

> " 'Sale' means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state."

Exhibit B Annexed to Complaint

The Alcoholic Beverage Control Law (§100[1]) further provides:

> "No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter."

Accordingly, in my opinion, the transaction involved is a sale or selling, and consequently cannot be conducted without obtaining an appropriate license.

In answer to your query as to the type of license required, seemingly the Alcoholic Beverage Control Law and the rules of the State Liquor Authority do not at present afford any license for this type of transaction.

Obviously this is not a sale for consumption on the premises. Broadly speaking, it is a sale for consumption off the premises. However, the corporation is not eligible for a license for off premises consumption. For one thing, Rule 17 of the Rules of the State Liquor Authority constitutes an order that there shall be no licenses issued within the counties of the city of New York for sale at retail of alcoholic beverages for off premises consumption. But even if the Liquor Authority were to amend this rule at this time for the purpose of licensing this particular operation, the premises physically do not meet the qualification for such a license. Such qualifications are contained in §105(2) of the Alcoholic Beverage Control Law and are as follows:

> "No premises shall be licensed to sell liquors and/or wines at retail for off premises consumption, unless said premises shall be located *in a store, the entrance to which shall be from the street level and located on a public thoroughfare in premises which may be occupied, operated or conducted for*

Exhibit B Annexed to Complaint

business, trade or industry or on an arcade or subsurface thoroughfare leading to a railroad terminal.'' [Emphasis mine.]

The premises here do not meet the requirements of the above statutory provision which I have underscored.

I conclude that without an amendment to the Alcoholic Beverage Control Law to specifically except this type of transaction from §3(28) of the statute and or to make provision for a special permit for such transactions, the transaction you describe must be construed a "sale" or "selling" and may not be conducted in the State of New York at this time, because there is no provision for a license therefor, and no alcoholic beverages in this State can be sold without a license.

Very truly yours,

s/ Louis J. Lefkowitz
LOUIS J. LEFKOWITZ
Attorney General

Exhibit C Annexed to Complaint

(Letter of State Liquor Authority, Dated July 11, 1960)

[LETTERHEAD OF]

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
STATE LIQUOR AUTHORITY
270 Broadway
New York 7

July 11, 1960

Kelly & Schwartz, Esqs.
1780 Broadway
New York 19, New York

Re: Idlewild Bon Voyage
Liquor Corporation

Dear Sirs:

This is in reply to your letters to the State Liquor Authority with respect to the proposed operations by the above corporation at the New York International Airport (Idlewild).

The Members of the Authority have determined at their meeting held on July 7, 1960, that the operation by your client is in conflict with the Laws of the State of New York and, therefore, would be illegal.

Enclosed is a copy of the opinion of the Attorney General of the State of New York dated June 30, 1960, to whom this matter was submitted.

Very truly yours,

STATE LIQUOR AUTHORITY

Hyman Amsel
Counsel

HA:cm
Enclosure

Exhibit D Annexed to Complaint

(Letter of New York State Department of Taxation, Dated August 2, 1954 and Section 424(1)(f) of New York State Tax Law)

COPY

STATE OF NEW YORK DEPARTMENT OF TAXATION AND FINANCE
Albany 1, N. Y.

August 2, 1954

TO ALL LIQUOR AND WINE DISTRIBUTORS:

There has been some confusion in the industry concerning the sales of wine and liquor to various airlines where the merchandise is delivered at airports within the State of New York. In order to overcome this confusion, this letter is being addressed so you may know that since January 1, 1954 all sales of wine and liquor to airline companies delivered within the State of New York are subject to the New York State tax except the following:

1. Sales in United States Customs Bond.
2. Sales of wine and liquors where the merchandise is stored in Class 6 Warehouse under Federal Regulations.
3. Domestic wines and liquors which will be sold to the airlines under benefit of a drawback of the Federal taxes by the distiller.

Very truly yours,

STATE TAX COMMISSION

By: John J. Purcell
Assistant Director

Exhibit D Annexed to Complaint

Section 424, subdivision 1(f) of the New York State Tax Law reads as follows:

"§424. *Taxes imposed.*—i. There are hereby levied and imposed the following excise taxes:

"(f) One dollar and fifty cents per gallon upon all other liquors, when sold or used within this state by a distributor, * * * except when sold or used under such circumstances that this state is without power to impose such tax * * *."

Exhibit E Annexed to Complaint

(Section 3, Subdivision 28, Section 62 and Section 100, Subdivisions 1 and 2, of Alcoholic Beverage Control Law of the State of New York)

Section 3, subdivision 28 of the Alcoholic Beverage Control Law provides:

"§3. *Definitions*

"Whenever used in this chapter, unless the context requires otherwise:

• • • • •

"28. 'Sale' means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state."

Section 62 of the Alcoholic Beverage Control Law provides:

"§62. *Wholesaler's liquor license*

"Any person may apply to the liquor authority for a license to sell liquor at wholesale. Such application shall be in writing and verified and shall contain such information as the liquor authority shall require. Such application shall be accompanied by a certified check, bank officers' check or draft, or money order for the amount required by this article for such license. If the liquor authority shall deny the application it shall return the fee to

Exhibit E Annexed to Complaint

the applicant, less fifteen dollars. If the liquor authority shall grant the application it shall issue a license in such form as shall be determined by its rules. Such license shall contain a description of the licensed premises and in form and in substance shall be a license to the person therein specifically designated to sell liquors at wholesale in the premises therein specifically licensed to duly licensed wholesalers, retailers and permittees in this state, and to sell liquor in bulk to a licensed rectifier or to a permittee engaged in the manufacture of products which are unfit for beverage use, for use in the manufacture of products produced and sold by such rectifier or permittee, and to sell or deliver liquor to persons outside the state pursuant to the laws of the place of such sale or delivery. Such a license shall also include the privilege to sell wine at wholesale under the same terms and conditions without the payment of any additional fee. As amended L. 1947, c. 132; L. 1951, c. 581, §3, eff. April 6, 1951."

Section 100, subdivisions 1 and 2 of the Alcoholic Beverage Control Law provides:

"§100. *Alcoholic beverages generally*

"1. No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter.

"2. No manufacturer and no wholesaler shall sell, or agree to sell or deliver in this state any alcoholic beverage for the purposes of resale to any person who is not duly licensed pursuant to this chapter to sell such beverages, at wholesale or retail, as the case may be, at the time of such agreement and sale."

Exhibit F Annexed to Complaint

(Section 121 of Alcoholic Beverage Control Law of the State of New York)

Section 121 of the Alcoholic Beverage Control Law provides:

"§ 121. *Review by courts*

"The following actions by the liquor authority shall be subject to review by the supreme court in the manner provided in article seventy-eight of the civil practice act or by any other appropriate remedy provided that no stay shall be granted pending the determination of the matter except on notice to the liquor authority and for a period not exceeding thirty days:

"1. Refusal by the liquor authority to issue a license or a permit.

"2. The issuance of a license or permit by the liquor authority contrary to the recommendations of a local board.

"3. The issuance of a license or permit by the liquor authority where the recommendation of a local board was not unanimous.

"4. The revocation, cancellation or suspension of a license or permit by the liquor authority.

"5. The failure or refusal by the liquor authority or a local board to render a decision within the time required by section one hundred twenty.

"6. The transfer by the liquor authority of a license or permit to any other premises, or the fail-

ure or refusal by the liquor authority to approve such a transfer.

"7. The issuance of an order of warning by the liquor authority.

"8. Refusal to approve alteration of premises. As amended L. 1952, c. 428; L. 1954, c. 350; L. 1959, c. 400, eff. April 15, 1959.

"Proceedings to review any action enumerated herein shall be entitled to a preference. As amended L. 1938, c. 329, § 5; L. 1940, c. 648, eff. April 19, 1940."

Application of Plaintiff for Convening of Three-Judge Court

Plaintiff, upon its complaint heretofore filed herein, hereby makes application for hearing of this cause and of the plaintiff's motion for an injunction, both preliminary and permanent, before a three-judge district court as required by Section 2281, Title 28 of the United States Code, and requests that the Chief Judge of the United States Court of Appeals for the Second Circuit be notified pursuant to Section 2284, Title 28 of the United States Code, of the presentation of plaintiff's application for an injunction in order that the necessary designation of judges for said court may be made.

KELLY AND SCHWARTZ
Attorneys for Plaintiff
Office and P. O. Address:
1780 Broadway
New York 19, N. Y.

Order to Show Cause for Three-Judge Court and Preliminary Injunction, Dated July 22, 1960

Upon the annexed affidavit of Arthur Giliotti, verified the 22nd day of July, 1960, upon the complaint herein and the exhibits annexed thereto and upon all the proceedings heretofore had herein, and it appearing to the Court that the actions threatened to be taken by the defendants against the plaintiff are subject to grave doubt as to their legality under the Constitution and laws of the United States, and if permitted by the defendants in accordance with their threats so to do would result in irreparable injury to the plaintiff,

Let the defendants and each of them show cause before a three-judge District Court to be convened pursuant to 28 U. S. C. §2284, at Room 506, United States Court House, Foley Square, New York, New York, at 10:00 o'clock A.M. on the 26th day of July, 1960, or as soon thereafter as counsel can be heard, why an order should not be entered in accordance with the prayer of the complaint for a preliminary injunction restraining the defendants and each of them, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, from enforcing or attempting to enforce against the plaintiff and from putting or attempting to put into execution as against it Section 3, Subdivision 28, and Section 62, and Section 100, Subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, and all other provisions of said Law which the defendants might claim would affect plaintiff's operations, either by invoking or attempting to invoke its civil or criminal sanctions, or otherwise; and it is

Order to Show Cause for Three-Judge Court and Preliminary Injunction

FURTHER ORDERED, that personal service of this order and the papers upon which it is based upon the defendants and each of them on or before the 23rd day of July, 1960 at 6:00 P.M. shall constitute good and sufficient service of this order to show cause.

Dated: New York, N. Y., July 22, 1960.

THOMAS F. MURPHY
U. S. D. J.

Affidavit of Arthur Giliotti in Support of Motion for Preliminary Injunction and Temporary Restraining Order, Dated July 22, 1960

State of New York, }
County of New York, } ss.:

ARTHUR GILIOTTI, being duly sworn, deposes and says:

1. I am the president of Idlewild Bon Voyage Liquor Corporation, the plaintiff in this action.

2. This is an action for an injunction under 28 U. S. C. §§2281 and 2284 to enjoin the defendants, and each of them, from enforcing or attempting to enforce against the plaintiff and from putting or attempting to put into execution as against it Section 3, subdivision 28, Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, and all other applicable provisions of said Law which defendants might claim would affect plaintiff's operations, either by invoking or attempting to invoke its civil or criminal sanctions or otherwise. Injunction is sought on the ground that the State Law violates the provisions of the Federal Consitution and Federal statutes referred to in the complaint. All of the allegations of fact contained in the complaint herein have been read by me and are true of my own knowledge and are incorporated herein by reference thereto.

3. Plaintiff is a New York corporation which occupies, under a lease from the Port of New York Authority dated October 31, 1956, certain space in the Arrivals Building at New York International Airport at Idlewild. The entire space is 16 feet wide and 30 feet, 4 inches in depth. The front portion of the space is used by plaintiff as an office

where orders are received for the sale by plaintiff for export of bonded wines and liquors, free of United States and New York State taxes. The rear portion of the premises is used for storage of United States Customs bonded liquor for export. The entire space is under the supervision and control of the United States Bureau of Customs both as to its construction and security and as to accountability for liquor exported.

4. The bonded wines and liquors are purchased by plaintiff from various suppliers, and withdrawn by it from Class 6 Government bonded manufacturing warehouses and United States Customs bonded warehouses for rewarehousing at the Customs controlled and supervised space of the plaintiff in the Arrivals Building from where it is exported. The plaintiff keeps records and receipts on Customs-approved forms for the disposition of each and every bottle withdrawn from Government bond.

5. Orders for the purchase of the bonded, tax-free wines and liquors are received by plaintiff at its office in the Arrivals Building from passengers departing on non-stop planes for foreign countries only, and payment therefor is made at said office. The goods are not delivered by plaintiff to the passengers, but to the airlines, on approved documents for foreign export, with delivery to the passengers to be made only at their foreign destination. The Bureau of Customs certifies that the goods are laden for export.

6. The bonded, tax-free wines and liquors, from the time they are withdrawn from these bonded warehouses to the time they are loaded on the carrier, remain in the continuous custody and under the continuous supervision of the Bureau of Customs.

Affidavit of Arthur Giliotti in Support of Motion for Preliminary Injunction and Temporary Restraining Order

7. The operations of the plaintiff are intended primarily for the benefit of Economy Fare passengers who constitute the majority of passengers departing from New York International Airport at Idlewild. The average sale consists of one bottle. A passenger going abroad who normally would pay approximately $7 for a bottle of liquor in most nations in Europe is enabled to bring into those nations his single bottle purchased from plaintiff at a cost of approximately $3. Most European countries limit to one bottle the amount of tax-free liquor a traveler may bring into the country.

8. The privilege of purchase thus afforded to passengers departing for foreign countries is a reciprocal privilege to that granted in such countries to passengers bound for the United States. The latter are generally permitted to purchase a limited amount of liquor free of United States duty, and free of United States and New York State tax, which they may bring into this country with them. The privilege afforded international travelers by the corporation not only tends to encourage foreign travel but the exports themselves open up a new market for American liquors. The operation of the plaintiff is a strong stimulant of foreign trade.

9. On April 15, 1958, the Treasury Department, Bureau of Customs, in a letter to the Honorable Robert W. Dill, Collector of Customs at the Port of New York, ruled that the transactions between plaintiff and passengers on foreign-bound airlines constitute exportations to the countries of destination of bonded, tax-free wines and liquors within the meaning of Section 311 of the Tariff Act of 1930, as amended, and the operations of the plaintiff in this respect were approved. (A copy of said letter is annexed to the complaint herein as Exhibit A.)

Affidavit of Arthur Giliotti in Support of Motion for Preliminary Injunction and Temporary Restraining Order

10. By letter dated July 11, 1960, the New York State Liquor Authority notified Messrs. Kelly and Schwartz, attorneys for the plaintiff corporation, that its members had determined that plaintiff's operation was "in conflict with the Laws of the State of New York and, therefore, would be illegal." This conclusion was based upon an opinion of the Attorney General of the State of New York, attached to said letter, wherein it was stated that plaintiff's operations constitute a sale or selling of liquor within the state which is illegal and that no provision is made in the Act for the licensing thereof, citing Section 3, subdivision 28, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law. (Copies of said opinion and letter are annexed to the complaint herein as Exhibits B and C.)

11. This determination of the State Liquor Authority is in direct conflict with a ruling of the Department of Taxation and Finance of the State of New York issued "To all Liquor and Wine Distributors" on August 2, 1954, which clarified confusion in the industry concerning sales of wine and liquor to airlines. It was stated that all such sales were subject to New York State tax except, so far as pertinent here, the following:

"1. Sales in United States Customs Bond.

"2. Sales of wine and liquors where the merchandise is stored in Class 6 Warehouse under Federal Regulations."

(A copy of said ruling is annexed to the complaint herein as Exhibit D.)

12. On the basis of its determination that plaintiff is violating the Alcoholic Beverage Control Law, defendants

Affidavit of Arthur Giliotti in Support of Motion for Preliminary Injunction and Temporary Restraining Order

have threatened to enforce and will enforce, unless restrained by this Court, the provisions of the said law against plaintiff to its great, immediate and irreparable damage, by restraining or endeavoring to restrain plaintiff in the conduct of its business, by prohibiting or endeavoring to prohibit completely the operations of the plaintiff, and by subjecting plaintiff to civil and criminal proceedings for the alleged violation of the said provisions of the law.

13. One accomplished result of the defendants' acts, to the injury of the plaintiff, has been a circularization of its members by the New York Importers and Distillers Association, Inc., including members who supply plaintiff with bonded, tax-free wines and liquors for export, advising them not to fill plaintiff's orders and not to otherwise sell such goods to plaintiff because of defendants' determination that plaintiff is violating the Alcoholic Beverage Control Law.

14. Unless the threatened acts of defendants are enjoined, plaintiff will sustain the loss and forfeiture of its valuable lease with the Port of New York Authority because the life of the lease is conditioned upon the continuance of plaintiff's operations.

15. Unless defendants' threatened acts are enjoined, plaintiff will be forced to close down and discontinue its operations, as a consequence of which plaintiff's business, valued in excess of $1,000,000, will be completely destroyed.

16. Unless defendants' threatened acts are enjoined, plaintiff will be forced to file a petition in bankruptcy by reason of the fact that the sales of bonded, tax-free wines

and liquors for export constitute the sole business of the plaintiff.

17. Unless defendants' threatened acts are enjoined, the plaintiff and its officers are liable to be subjected to fines or criminal penalties provided for by Section 130 of the Alcoholic Beverage Control Law by reason of defendants' claim that plaintiff is violating the provisions of that law.

18. I am advised by counsel that the plaintiff has neither any administrative remedy under the Alcoholic Beverage Control Law nor any adequate remedy in the courts of the State of New York for the reason that Section 121 of said law expressly limits a stay pending review to a period of not to exceed thirty days. (A copy of Section 121 is annexed to the complaint as Exhibit F.) Such a limited stay would work to the irreparable injury of the plaintiff, whereas the delay occasioned by a preliminary injunction granted by this court would in no way injure the defendants because the bonded wines and liquors in the warehouse on plaintiff's premises, and in the custody and under the supervision of the Customs Bureau, cannot under any circumstances be removed from said warehouse and diverted to use within the State of New York or within the United States for consumption or otherwise. Therefore, there is no question of plaintiff's operations interfering with the policy of the Alcoholic Beverage Control Law, stated in Section 2 thereof to be the promotion and fostering of temperance in the consumption of alcoholic beverages, nor do plaintiff's operations come into collision with the reason for the law, namely "the protection, health, welfare and safety of the people of the state."

19. The whole matter of the nature and character of plaintiff's operations as hereinbefore described and the

basis of their exemption from state regulations and control have been fully presented to the defendants, and plaintiff's position has been documented in correspondence with the defendants, despite which they persist in their threats to enforce their determination that plaintiff is violating the Alcoholic Beverage Control Law and to restrain or endeavor to restrain and prohibit plaintiff's operations and the continuance of its business.

20. No previous application has been made for the relief herein requested.

WHEREFORE, plaintiff prays (1) that a preliminary injunction issue enjoining the defendants, and each of them, from enforcing or attempting to enforce against plaintiff and from putting or attempting to put into execution as against plaintiff Section 3, subdivision 28, Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law, and all other provisions of said law which defendants might claim would affect plaintiff's operations, either by invoking or attempting to invoke its civil or criminal sanctions or otherwise, and (2) that, pending the hearing and determination of the motion for a preliminary injunction, a temporary restraining order issue restraining the defendants, and each of them, as aforesaid.

ARTHUR GILIOTTI

Sworn to before me this
22nd day of July, 1960.

DONALD L. PRICE
Notary Public, State of New York
No. 24-8439300
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1962

Notice of Motion of Defendants to Dismiss Complaint, Dated July 25, 1960

Sirs:

Please Take Notice that the undersigned will move this Court, at a stated term for motions to be held in Room 506 of the United States Court House, Foley Square, City of New York, on the 26th day of July, 1960, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order pursuant to Rule 12 of the Federal Rules of Civil Procedure, dismissing the complaint on the grounds that it fails to state a claim against the defendants upon which relief can be granted because:

(1) It presents no actual controversy;

(2) It fails to state a cause of action;

(3) It fails to present any real or substantial Federal question;

(4) The state courts afford a plain, speedy and efficient remedy by suit for injunction to the plaintiff and that the construction of the State Statutes should first be determined by the State Courts; and

(5) Alcoholic Beverage Control Law §3, subd. 28, §62 and §100, subds. 1 and 2, and related sections, are not unconstitutional.

The undersigned will further move, pursuant to said Rule 12, for an order dismissing the complaint on the ground that the Court lacks jurisdiction over the subject matter, because the complaint fails to show that plaintiff has been deprived of any right secured by the Constitution of the United States or by any Act of Congress

providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

PLEASE TAKE FURTHER NOTICE that the undersigned will at the same time and place move for such other, further and different relief as to the Court may seem just and proper.

Dated: New York, N. Y., July 25, 1960.

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Office & P. O. Address
80 Centre Street
New York 13, New York

To:

KELLY & SCHWARTZ, Esqs.
Attorneys for Plaintiff
1780 Broadway
New York 19, New York

Affidavit of Thomas E. Rohan in Opposition to Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order, Dated August 1, 1960

State of New York, }
County of New York, } ss.:

THOMAS E. ROHAN, being duly sworn, says that he is the Chairman of the State Liquor Authority of the State of New York and one of the defendants above-named, and that he is familiar with the facts and circumstances hereinafter set forth.

Plaintiff has brought this action allegedly under 28 U. S. C. §§2281 and 2284 to enjoin the defendants from enforcing or attempting to enforce against the plaintiff and from putting or attempting to put into execution as against it Section 3, subdivision 28, Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, and all other applicable provisions of said law which defendants might claim would affect plaintiff's operations, either by invoking or attempting to invoke its civil or criminal sanctions or otherwise.

In connection with this action, plaintiff moves herein for an order granting to it a preliminary injunction restraining the defendants as hereinabove indicated. Simultaneously with defendants' opposition to the within motion, they will move this Court upon notice already given for an order dismissing the plaintiff's complaint upon the grounds set forth in the notice of motion.

It is respectfully submitted that this motion should be denied as a matter of law and within the sound discretion of this Court.

As early as May 6, 1958, plaintiff sought to obtain the State Liquor Authority's opinion as to the legality of its (plaintiff's) proposed operation in the sale of alcoholic beverages on premises leased by it at the New York

Affidavit of Thomas E. Rohan in Opposition to Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order

International Airport (Idlewild) located in the County of Queens, State of New York. After many conferences and study, the Authority advised the plaintiff that its proposed operation would not be legal under the provisions of the Alcoholic Beverage Control Law of the State of New York.

Thereafter, on February 19, 1959, plaintiff again submitted a proposed plan of operation with a slight modification of its original submission.

Thereafter, on May 8, 1959, after full consideration by the Members of the Authority, plaintiff was advised that its proposed operation could not be legally conducted in New York State.

On May 19, 1959, plaintiff sought reconsideration by the Authority of its former decisions. Further consideration of plaintiff's proposed business operations was denied on July 7, 1959.

Apparently plaintiff did not enter upon its proposed business. This is indicated by the letter from plaintiff's counsel to the Authority dated February 10, 1960. In this letter, plaintiff stated that "[I]nasmuch as no consent to the proposed operation has been obtained from your Authority, the space has been vacant to the present time." Also, plaintiff stated that the Port of New York Authority had advised it that unless it commenced actual operations, it would be obliged to give its consent to similar operations by another concern. Asserting that if such a situation developed, an injustice would be suffered by it, plaintiff asked for reconsideration of its original application of May 6, 1958. Plaintiff's request for reconsideration was submitted by its letter of March 24, 1960, in which it requested a ruling from the Authority that under the law set forth by the plaintiff that the proposed operations were not subject to the jurisdiction or the control of the

Affidavit of Thomas E. Rohan in Opposition to Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order

New York State Liquor Authority. This request, of course, was in direct contradiction with the Authority's previous determination that plaintiff's proposed operation would constitute the sale of alcoholic beverages as defined by Section 3, subdivision 28, of the Alcoholic Beverage Control Law, and that Section 100, subdivision 1, of the Alcoholic Beverage Control Law prohibits such trafficking in alcoholic beverages without a license. It was also the Authority's determination that the Alcoholic Beverage Control Law makes no provision for a license or permit which would authorize the plaintiff to engage in the sale of alcoholic beverages in the State of New York in the particular manner outlined by it.

Under the circumstances, the Authority requested the Attorney General of the State of New York to render a formal opinion upon the legality of the plaintiff's proposed manner of trafficking in alcoholic beverages.

On June 30, 1960, the Attorney General of the State of New York rendered his opinion that the "transactions you describe must be construed a 'sale' or 'selling' and may not be conducted in the State of New York at this time, because there is no provision for a license therefor, and no alcoholic beverages in this State can be sold without a license." The complete opinion rendered by the Attorney General is annexed to the complaint as Exhibit "B" and, therefore, is not set forth in full herein.

On July 11, 1960, in reply to plaintiff's letters with respect to its proposed operation, counsel for plaintiff was advised that the Authority had determined that the operation so outlined was in conflict with the laws of the State of New York and that, therefore, it would be illegal. A copy of the opinion of the Attorney General of the State

of New York dated June 30, 1960, hereinabove referred to, was enclosed. This action then followed. (Sometime subsequent to its letter of February 10, 1960, and in spite of the Authority's ruling as to its illegality, plaintiff evidently entered upon and commenced its operation.)

It is apparent from the foregoing that the opinion rendered by the Authority was in direct response to, and resulted from, a request made therefor by the plaintiff. Under these circumstances, it is respectfully submitted plaintiff is not entitled to and should not receive at the hands of this Court a relief in the form of a permanent or temporary injunction restraining the Authority from having responded to an inquiry made to it by the plaintiff.

It is further submitted, as will be more fully explored in the memorandum of law to be submitted herewith, that the plaintiff's remedy is to apply to the Court of the State of New York for a determination with respect to the applicability of the provisions of the Alcoholic Beverage Control Law to the operations *now* being carried on by the plaintiff.

Important in the consideration of plaintiff's operation, in the light of the provisions of the Alcoholic Beverage Control Law, it is significant to note that plaintiff purchases its liquor from suppliers who maintain such liquor in bonded warehouses known as Class 6 Warehouses (export). Upon the purchase being culminated, these suppliers cause the liquor to be delivered to the plaintiff's premises at Idlewild Airport, where plaintiff displays it and stores it. Plaintiff, of course, is not under bond, but claims that the Customs officials maintain a control over its stock. As plaintiff's purchases are made of bonded liquor, no Federal or State tax is included in the cost to it.

Affidavit of Thomas E. Rohan in Opposition to Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order

Plaintiff sells its liquor either to passengers about to depart by airplane or to others on their behalf. Orders for such liquor are accepted on plaintiff's premises and payment therefor received then. It is claimed, however, that delivery of the liquor so purchased at plaintiff's premises is not made to the departing passenger until the plane lands on foreign soil. Likewise, no tax is added to the retail sales price and, consequently, the price of the liquor sold is considerably less than the price of such liquor if purchased in a licensed retail liquor store.

These facts justify the conclusion that the plaintiff's operation amounts to trafficking in alcoholic beverages in the State of New York. Such traffic now being conducted is illegal because (1) under the Alcoholic Beverage Control Law no person or corporation may engage in the traffic of alcoholic beverages in the State of New York without obtaining an appropriate license therefor, and (2) the Legislature of the State of New York has seen fit not to provide an appropriate license to cover such traffic.

It is, therefore, respectfully submitted that plaintiff is not entitled to the relief requested herein, nor to any relief, and that this motion should be denied in all respects.

/s/ Thomas E. Rohan

Sworn to before me this
1st day of August, 1960.

Madeline G. Lee
Notary Public, State of New York
No. 03-7470350
Qualified in Bronx County
Commission Expires March 30, 1962

Opinion and Order of Judge Bicks, Dated November 4, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civil 2902

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

Plaintiff,

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Defendants.

BICKS, District Judge.

Plaintiff, a New York corporation, conducts business from premises it occupies at the New York International Airport, County of Queens, pursuant to a lease by the terms of which the demised premises may be used only as an office for the receipt of orders for export of United States customs bonded wines and liquors. The defendants constitute the NEW YORK STATE LIQUOR AUTHORITY, an administrative agency created under Article 2 of the Alcoholic Beverage Control Law of the State of New York.

Wines and liquors sold by the plaintiff are not for consumption in the State of New York or in any other state, territory or possession of the United States.

The premises occupied by plaintiff have been approved by and are under the supervision of the United States Bureau of Customs. The wines and liquors sold by plaintiff are purchased solely for export from vendors who withdraw the same from Class 6 United States Government bonded manufacturing and United States Customs bonded warehouses for rewarehousing at the United States Customs-controlled space in plaintiff's leased premises. Every bottle withdrawn by plaintiff is, pursuant to the provisions of the Internal Revenue Code and applicable regulations thereunder, labeled "Bottled for export from the U. S. A." Plaintiff complies as well with §311 of the Tariff Act as amended, 19 U. S. C. A. §1311, §5301 of the Internal Revenue Code and the regulations promulgated under each of said statutes, the design and purpose whereof being to prevent diversion of any of the bonded wines and liquors to any use other than export from the United States.

Plaintiff receives orders and payment at its premises at the airport from passengers departing by non-stop planes destined for foreign countries. The merchandise is delivered to the air line with approved documents for foreign export, delivery to be made to the passenger-purchaser only upon arrival at the foreign destination. The passenger is thus enabled to export for delivery to himself upon arrival abroad, a quantity of liquor not exceeding the maximum permitted for duty free import at the point of disembarkation, at a substantial saving. The Treasury Department has expressly approved these procedures and has ruled that sales so consummated constitute an exportation of merchandise within the meaning of §311 of the Tariff Act.

Plaintiff made inquiry of the New York State Liquor Authority whether conduct of its business in the manner above set forth contravenes the New York State Alcoholic Beverage Control Law. Before replying, the State Liquor Authority asked the New York State Attorney General for an opinion. He ruled (See 1960, Op. Atty. Gen. June 30) that the business of the plaintiff constituted sales or selling within the meaning of §3(28) of the New York State Alcoholic Beverage Control Law;[1] that said law contains no provision that would authorize issuance of a license to plaintiff to conduct its business, and that under §100(1)[2] of the State Law no person is permitted to sell any alcoholic beverage within the state without a license. The New York Importers & Distillers Association circularized its members advising that in view of the position of the Attorney General and of §62 of the Alcoholic Beverage Control Law, they could not legally fill plaintiff's orders. Plaintiff has not since been able to make purchases to meet its requirements and faces the prospect of closing its doors, with consequent substantial damage.

Plaintiff urges that §3(28), §62 and §100(1) and (2) of the New York State Alcoholic Beverage Control Law,

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(1) Sec. 3(28) provides as follows:

"'Sale' means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state."

(2) Sec. 100(1) provides:

"No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter."

as sought to be applied to it are repugnant to (i) the commerce clause, (ii) the clause prohibiting a state from laying imposts or duties on imports or exports without the consent of Congress, and (iii) the supremacy clause of the constitution and therefore unconstitutional. These contentions rest on the claim that the Tariff Act of 1930 as amended, and the regulations adopted thereunder, taken together with the applicable provisions of the Internal Revenue Code, constitute a comprehensive, exclusive and preemptive scheme duly adopted by Congress for the regulation, encouragement and promotion of foreign commerce in, and export of, bonded wines and liquors.

Plaintiff seeks declaratory and injunctive relief and has moved for the impanelling of a three-judge district court pursuant to 28 U. S. C. A. §§2281, 2284.

The threshold issue is whether the federal courts should accept jurisdiction now since the issues have never been presented to or passed upon by the state courts. In a series of cases beginning with *Railroad Comm'n* v. *Pullman Co.*, 1941, 312 U. S. 496, the Supreme Court has set out the procedure for resolving constitutional issues which are reasonably open to construction. "* * * [N]o principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. See, e.g., *Railroad Comm'n* v. *Pullman Co., supra; Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168; *Spector Motor Service, Inc.* v. *McLaughlin*, 327 U. S. 582; *Shipman* v. *Du Pre*, 339 U. S. 321; *Albertson* v. *Millard*, 345 U. S. 242; *Government & Civic Employees* v. *Windsor*, 353 U. S. 364. This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy 323 U. S. 101; *American Federation of Labor* v. *Watson*,

of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication. See *Chicago* v. *Fieldcrest Dairies, Inc., supra*, at 172-173." *Harrison* v. *N. A. A. C. P.*, 1959, 360 U. S. 167, 176-177. "Reflected among the concerns which have traditionally counseled a federal court to stay its hand are the desirability of avoiding unseemly conflict between two sovereignties, the unnecessary impairment of state functions, and the premature determination of constitutional questions. * * *" *Martin* v. *Creasy*, 1959, 360 U. S. 219, 224.

The controversy between IDLEWILD and the LIQUOR AUTHORITY comes to the court in precisely the tentative and hypothetical posture with which *Pullman* and its progeny are concerned. The State Attorney General rendered an opinion and acting upon that opinion the LIQUOR AUTHORITY advised plaintiff that its operation is "illegal". Neither the Attorney General's opinion nor the action of the LIQUOR AUTHORITY has been reviewed in the State Courts.

State court interpretation of state policies is especially desirable where the statute in question "provides a unified method for the formation of policy and determination of cases by the [state administrative body] * * * and by the state courts." *Burford* v. *Sun Oil Co.*, 1943, 319 U. S. 315, 333, 334.

The Alcoholic Beverage Control Law provides a comprehensive and unified scheme for the regulation and control of the sale and distribution of liquor through the State Liquor Authority. The Authority has broad discretionary powers to license the sale of liquor at wholesale and retail, to limit, revoke or suspend outstanding licenses, to specify standards of manufacture and fermentation, to hold hearings and subpoena witnesses, and to promulgate rules and regulations to promote the foregoing functions. Alcoholic Beverage Control Law, §17, *John J. King, Inc.* v. *O'Connell*, 1952, 280 App. Div. 852;

Application of Gambino, 1957, 4 A. D. 2d 37; *Berkowitz* v. *Rohan*, 1959, 193 N. Y. S. 2d 345.

In *Burford*, *supra*, where the validity of Texas oil drilling permits was attacked in the federal court, the Supreme Court, characterizing the Texas statutes under which the permits were granted as "part of the general regulatory system devised for the conservation of oil and gas", 319 U. S. at 318, indicated that "question[s] of regulation of the industry by the state administrative agency * * * so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them." 319 U. S. at 332.

"[N]o matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination * * *. In this situation, a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication." *Railroad Commission* v. *Pullman Co.*, *supra*, at 499-500. In the light of the circumstances of this case §§3(28), 62 and 100(1) and (2) may be construed by the state courts to avoid or transform the issues raised herein. See, e.g., *During* v. *Valente*, 267 App. Div. 383.

Martin v. *Creasy*, 1959, *supra*, teaches that irreparable injury, vel non, the District Court should not adjudicate a constitutional issue presented in a hypothetical posture. In that case, plaintiffs sought immediate relief from alleged irreparable injury as the result of the operation of Pennsylvania's limited access highway statute. Impressed by allegations of immediate irreparable harm similar to those urged by plaintiff on this motion, the District Court was persuaded that refusal to exercise jurisdiction would cause plaintiffs to "suffer substantial financial losses during the time it would take to litigate the constitutionality of the statute in the State Courts, which losses could never

be recouped if the statute were eventually declared to be unconstitutional." *Creasy* v. *Stevens*, D.C. W.D. Penna., 1958, 160 F. Supp. 404, 409, *reversed*, *Martin* v. *Creasy*, *supra*. The Supreme Court held, "[a]ssuming that there was a basis to support intervention by a court of equity, the District Court should nevertheless have declined to adjudicate this controversy." *Martin* v. *Creasy*, *supra*, at 224.

Although the substantive issues raised in the complaint may not be considered by the judge to whom application under 28 U.S.C.A. §2281 is made, he has the power to retain jurisdiction pending state court adjudication where, as here, there is insufficient basis to support intervention by a federal court of equity. *Snyder's Drug Stores* v. *Taylor*, 8th Cir., 1955, 227 F. 2d 162; *Island Steamship Lines, Inc.* v. *Glennon*, D.C. Mass., 1959, 178 F. Supp. 292, 295, 296; *Linehan* v. *Waterfront Commission of New York Harbor*, D.C. S.D.N.Y., 1953, 116 F. Supp. 401.

Motion for impanelling of a three-judge court denied, with leave to renew after the state court has ruled.

So ordered.

Dated: November 4, 1960.

Alexander Bicks
United States District Judge.

Notice of Appeal, Dated November 16, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civil 2902

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

Plaintiff,

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Defendants.

SIR:

PLEASE TAKE NOTICE that Idlewild Bon Voyage Liquor Corporation, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the Honorable Alexander Bicks, entered herein on November 4, 1960, refusing plaintiff's application for a temporary restraining order and a preliminary injunction, denying plaintiff's motion for the impanelling of a three-judge court, and staying further procedure in the action.

Dated: New York, New York, November 16, 1960.

Yours, etc.

KELLY & SCHWARTZ
Attorneys for Plaintiff
Office and P. O. Address:
1780 Broadway
New York 19, N. Y.

To:

HON. LOUIS J. LEFKOWITZ, Attorney General
Attorney for Defendants
Office and P. O. Address:
80 Centre Street
New York 13, N. Y.

Plaintiff's Application by Order to Show Cause to Quash Subpoena with Stay, Dated November 25, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Upon the annexed affidavit of Charles H. Tuttle, verified the 25th day of November, 1960; upon the decision and order of Honorable Alexander Bicks herein, dated and filed November 4, 1960; upon the pleadings, and upon all the proceedings heretofore had herein,

And it appearing to the Court that (1) there is grave doubt under the Constitution and Laws of the United States and the aforesaid decision and order of Judge Bicks as to the legality of a certain subpoena, dated November 22, and returnable November 29, 1960, directed to the plaintiff, and issued by the New York State Liquor Authority of which the defendants are the Chairman, Members and Commissioners, respectively; (2) the plaintiff will be irreparably injured if it is required to comply with the aforesaid subpoena on the return date thereof; and (3) there will be no opportunity to determine the validity of the aforesaid subpoena prior to its return date unless a temporary restraining order is issued,

LET the defendants and each of them show cause before this Court at Room 506, United States Courthouse, Foley Square, New York, New York, on the 29th day of November, 1960 at 10:00 A. M., or as soon thereafter as counsel can be heard why the aforesaid subpoena should not be quashed; and it is

ORDERED that the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in con-

Plaintiff's Application by Order to Show Cause to Quash Subpoena with Stay, Dated November 25, 1960

cert with them, are hereby enjoined and restrained from taking any action pursuant to the aforesaid subpoena until the 5th day of December, 1960, or until the earlier determination of this application; and it is

FURTHER ORDERED that personal service of this order to show cause and the papers on which it is based upon the attorney for the defendants on or before the 28th day of November, 1960 at 11:00 A. M. shall constitute a sufficient service of this Order to Show Cause.

Dated: New York, N. Y.
5:45 PM November 25th, 1960.

Lloyd F. MacMahon
U. S. D. J.

Affidavit of Charles H. Tuttle in Support of Application to Quash Subpoena, Verified November 25, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

State of New York,)
County of New York,) ss.:

CHARLES H. TUTTLE, being duly sworn, says:

I am counsel for the plaintiff.

Nature of this Application

1. I make this affidavit in support of the plaintiff's application, by order to show cause, to quash the subpoena (Exhibit A, hereto) dated November 22 and returnable November 29, 1960, directed to the plaintiff, and issued by the New York State Liquor Authority of which the defendants are Chairman, Members and Commissioners.

2. The plaintiff seeks an opportunity to appeal Judge Bicks' decision refusing its application for the impanelling of a three-judge court and for a temporary restraining order and a preliminary injunction restraining the defendants from asserting jurisdiction over, and destroying thereby, the plaintiff's business in violation of the plaintiff's asserted constitutional rights.

3. The subpoena issued by the State Liquor Authority after the plaintiff's appeal was taken is a manifest attempt to thwart the decision of Judge Bicks; to render futile the plaintiff's right of appeal, and to assert an

Affidavit of Charles H. Tuttle in Support of Application to Quash Subpoena, Verified November 25, 1960

unlawful jurisdiction over the plaintiff and its business which the defendants themselves expressly disclaimed before Judge Bicks.

Nature of the Case

4. This is an action for a declaratory judgment and injunction against the Chairman, Members and Commissioners of the New York State Liquor Authority pursuant to Chapters 151 and 155 of the Judicial Code, 28 U. S. C. §§2201-2 and 2281-4, respectively.

5. The plaintiff, a New York corporation, is engaged in selling bottled liquor solely for export at premises leased from the Port of New York Authority, a bi-state agency, at New York International Airport ("Idlewild").

6. Judge Bicks, in his decision and order dated November 4, 1960 (Exhibit B, hereto) has accurately stated the nature of the plaintiff's business, as follows:

> "Wines and liquors sold by the plaintiff are not for consumption in the State of New York or in any other state, territory or possession of the United States.
>
> "The premises occupied by plaintiff have been approved by and are under the supervision of the United States Bureau of Customs. The wines and liquors sold by plaintiff are purchased solely for export from vendors who withdraw the same from Class 6 United States Government bonded manufacturing and United States Customs bonded warehouses for warehousing at the United States Customs-controlled space in plaintiff's leased premises. Every bottle withdrawn by plaintiff is, pursuant to

the provisions of the Internal Revenue Code and applicable regulations thereunder, labeled 'Bottled for export from the U. S. A.' Plaintiff complies as well with §311 of the Tariff Act as amended, 19 U. S. C. A. §1311, §3301 of the Internal Revenue Code and the regulations promulgated under each of said statutes, the design and purpose whereof being to prevent diversion of any of the bonded wines and liquors to any use other than export from the United States.

"Plaintiff receives orders and payment at its premises at the airport from passengers departing by non-stop planes destined for foreign countries. The merchandise is delivered to the air line with approved documents for foreign export, delivery to be made to the passenger-purchaser only upon arrival at the foreign destination. The passenger is thus enabled to export for delivery to himself upon arrival abroad, a quantity of liquor not exceeding the maximum permitted for duty free import at the point of disembarkation, at a substantial saving. The Treasury Department has expressly approved these procedures and has ruled that sales so consummated constitute an exportation of merchandise within the meaning of §311 of the Tariff Act."

7. The New York State Tax Commission has also ruled that such sales are not subject to New York State tax (Complaint, Exhibit D).

8. Out of an abundance of caution, as Judge Bicks found:

"Plaintiff made inquiry of the New York State Liquor Authority whether conduct of its business

> in the manner above set forth contravenes the New York State Alcoholic Beverage Control Law. Before replying, the State Liquor Authority asked the New York State Attorney General for an opinion. He ruled (See 1960, Op. Atty. Gen. June 30) that the business of the plaintiff constituted sales or selling within the meaning of §3(28) of the New York State Alcoholic Beverage Control Law; that said law contains no provision that would authorize issuance of a license to plaintiff to conduct its business, and that under §100 of the State Law no person is permitted to sell any alcoholic beverage within the state without a license."

Thereafter, the State Liquor Authority determined, and so advised the plaintiff's counsel (Complaint, Exhibit C), that the plaintiff's business

> "• • • is in conflict with the Laws of the State of New York and, therefore, would be illegal."

9. This opinion of the New York Attorney General and determination by the State Liquor Authority, was contrary to the rulings of the U. S. Treasury Department, Bureau of Customs and the New York State Tax Commission—to say nothing of the federal Constitutional and statutory provisions on which they rest.

10. Its practical effect was to drive the plaintiff out of business. As Judge Bicks also found:

> "The New York Importers & Distillers Association circularized its members advising that in view of the position of the Attorney General and of §62 of the Alcoholic Beverage Control Law, they could not

legally fill plaintiff's orders. Plaintiff has not since been able to make purchases to meet its requirements and faces the prospect of closing its doors, with consequent substantial damage."

Hence, the plaintiff is threatened with immediate, irreparable injury.

The Institution of this Action

11. This action was accordingly instituted on July 22, 1960. The complaint alleges that the provisions of the New York State Alcoholic Beverage Control Law, as applied to the plaintiff, are unconstitutional under (i) the Commerce clause, (ii) the clause prohibiting a State from laying imposts or duties on imports and exports without the consent of Congress, and (iii) the Supremacy clause of the Constitution of the United States.

12. The complaint further alleges that the Tariff Act of 1930, as amended, 19 U. S. C. §1311, and the regulations thereunder, together with the applicable provisions of the Internal Revenue Code, 26 U. S. C. §§5521, 5522, constitute a comprehensive, exclusive and preemptive scheme duly adopted by Congress for the regulation, encouragement and promotion of foreign commerce in, and export of, bonded wines and liquors.

13. The plaintiff insists that the State of New York may not trespass on this exclusively Federal sphere.

14. Accordingly, a motion for the impanelling of a three-judge court pursuant to 28 U. S. C. §§2281-4 and an application, by order to show cause, for a temporary injunction were filed and served simultaneously with the complaint.

Affidavit of Charles H. Tuttle in Support of Application to Quash Subpoena, Verified November 25, 1960

The Defendants' Position

15. The defendants assert, as already noted, that the plaintiff's business consists of "sales" of liquor in New York; but since the New York Alcoholic Beverage Control Law does not expressly provide for a license for such sales for export, the defendants claim the plaintiff's business is forbidden and illegal under that State Law.

16. The defendants appeared by the Attorney-General of the State of New York and cross-moved to dismiss the complaint on the ground, among others, that:

> "It presents no actual controversy;
>
> • • •
>
> "The state courts afford a plain, speedy and efficient remedy by suit for injunction to the plaintiff and that the construction of the State Statutes should first be determined by the State Courts."

17. In connection with their assertion that this case "presents no actual controversy," the defendants' supporting brief (pp. 9-10) asserted:

> "*Since the plaintiff is a non-licensee there is no real action the State Liquor Authority can take against the plaintiff.*"

18. As for their contention that the plaintiff has an adequate remedy in the State courts, the defendants' brief (p. 10) pointed to Section 121 of the Alcoholic Beverage Control Law as affording a possible remedy, but in the same breath asserted that the statute was inapplicable. To quote the defendants:

Affidavit of Charles H. Tuttle in Support of Application to Quash Subpoena, Verified November 25, 1960

> "The plaintiff has an adequate remedy in the State Courts. Section 121 of the Alcoholic Beverage Control Law, hereinbefore quoted, provides that the issuance of any order of warning of the Liquor Authority may be reviewed in the State Supreme Court. By no stretch of the imagination, however, can the above-mentioned notice given the plaintiff, be construed as an order of warning. Even if it were so construed, there is no power of its own with which the Authority could back up such order of warning."

Moreover, Section 121 plainly does *not* afford an adequate remedy, as Judge Rayfiel held in *Burack* v. *State Liquor Authority of the State of New York*, 160 F. Supp. 161, 165, for it permits a stay *for thirty days only*, and the period cannot be extended. (*Matter of Yacht Club* v. *Bruchman*, 276 N. Y. 44.)

Judge Bicks' Decision and the Plaintiff's Appeal

19. In his decision of November 4, 1960, Judge Bicks formulated "the threshold issue" to be:

> "* * * whether the federal courts should accept jurisdiction now since the issues have never been presented to or passed upon by the state courts."

20. Judge Bicks resolved this question adversely to the plaintiff, holding:

> "Although the substantive issues raised in the complaint may not be considered by the judge to whom application under 28 U.S.C.A. §2281 is made, he has the power to retain jurisdiction pending state court adjudication where, as here, there is insuffi-

cient basis to support intervention by a federal court of equity. (Citing cases)

"Motion for impanelling of a three-judge court denied, with leave to renew after the state court has ruled."

21. The plaintiff promptly appealed to the Court of Appeals from Judge Bicks' decision by notice of appeal (Exhibit C, hereto) which was served by the plaintiff on November 17, 1960, filed on November 18, 1960, and reserved by the Clerk on November 23, 1960. The record has been docketed in the Court of Appeals and is in the hands of the printer.

The State Liquor Authority Precipitately Served This Subpoena, Contrary to the Defendants' Representations Before Judge Bicks, In A Manifest Effort To Prejudice The Plaintiff's Efforts to Pursue Its Legal Remedies In the Courts

22. Five days *after* the plaintiff's notice of appeal had been served on the defendants' attorney on November 17, 1960, this subpoena *duces tecum* was issued and served on the plaintiff by the State Liquor Authority under date of November 22, 1960.

23. The subpoena is returnable November 29, 1960 and commands the plaintiff to appear and "give evidence relating to the business being conducted" by it "*under the license to sell alcoholic beverages issued by the State Liquor Authority.*"

24. The defendants' whole position, however, predicates that *the plaintiff does not have, and cannot be issued, any such license.*

25. The State Liquor Authority expressly rested its determination that the plaintiff's business "is in conflict with the Laws of the State of New York" and "illegal" on the opinion of the New York State Attorney-General, who represents the defendants here, that

"* * * the Alcoholic Beverage Control Law and rules of the State Liquor Authority do not at present afford any license for this type of action."

26. In successfully persuading Judge Bicks to refuse the plaintiff's applications for a three-judge court and for temporary injunctive relief, the defendants, through the New York State Attorney-General, expressly represented in their brief (pp. 9-10), "*Since the plaintiff is a non-licensee, there is no real action the State Liquor Authority can take against the plaintiff.*" Their motion and supporting brief before Judge Bicks emphasized and re-emphasized their contention that "The plaintiff has an adequate remedy in the State *Courts.*"

27. Having induced Judge Bicks to refuse the relief requested by the plaintiff with these representations, however, the State Liquor Authority now attempts by this subpoena to reverse its field, and to precipitate the plaintiff before itself as prosecutor, judge and jury to pass on its own attack upon the plaintiff's asserted federal constitutional rights.

28. This *volte face* can have but one purpose, I submit: to frustrate the plaintiff's appeal, already taken to review Judge Bicks' decision and order, and to prejudice the plaintiff's attempt to secure redress of its rights in the Courts,—even in the State Courts to which Judge Bicks'

Supplemental Affidavit of John F. Kelly in Support of Plaintiff's Motion, Verified December 5, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

State of New York, }
County of New York, } ss.:

JOHN F. KELLY, being duly sworn, deposes and says:

I am counsel for the plaintiff.

On December 5th, 1960, I called the office of Overland Motor Freight Co. Inc., at 459 West 19th Street, New York City, New York, and spoke to Mr. William Hinchy, the dispatcher for the said company, and inquired as to a shipment of Customs Bonded Liquor destined for Idlewild Bon Voyage Liquor Corp.

Mr. Hinchy advised that two representatives of the New York State Liquor Authority, Mr. William Heelan and Mr. Harry Newman, had visited his office and had identified themselves as representatives of the New York State Liquor Authority, and had given their telephone number as BA 7-1616, Extensions 7118 and 7215, which is the telephone number of the New York State Liquor Authority.

Mr. Hinchy stated that the said representatives of the New York State Liquor Authority advised him that Idlewild Bon Voyage Liquor Corp., is an unlicensed liquor dealer and therefore he would not make any deliveries to it.

Mr. Hinchy advised deponent that his company is a bonded interstate carrier and is authorized to carry Customs Bonded Merchandise but it does not have a license from the New York State Liquor Authority.

Mr. Hinchy stated further that even though his company had no license from the New York State Liquor Authority, it would not make a delivery where any Federal, State or City agency said that such delivery would be unlawful.

Mr. Hinchy said "We may be looking for a liquor license from the State of New York next week or next month or next year, and then where would this company be if we went and made a delivery to Bon Voyage Liquor Corp., after they had told us not to do so."

Mr. Hinchy further stated that the said representatives of the New York State Liquor Authority had informed him that they were visiting various trucking concerns on this matter and that they had been to three other carriers before coming to him.

(Sworn to by John F. Kelly December 5, 1960.)

decision and order consigned the plaintiff at the defendants' behest.

29. The plaintiff, in short, is the proverbial "little fellow", caught in the gears between the machinery of the Federal and State Governments. The defendants should not, I submit, be permitted to put that machinery precipitately into motion while the plaintiff is attempting to extricate itself in accordance with its lawful rights.

30. I respectfully request, therefore, that this subpoena be quashed, so that the plaintiff may pursue its lawful rights and remedies in due course.

31. No previous application for this relief has been made.

(Sworn to by Charles H. Tuttle on November 25, 1960.)

Exhibit A Annexed to Tuttle Affidavit

(Subpoena Duces Tecum)

STATE OF NEW YORK

EXECUTIVE DEPARTMENT

DIVISION OF ALCOHOLIC BEVERAGE CONTROL

Re: Serial No. .....

THE PEOPLE OF THE STATE OF NEW YORK

To:

Idlewild Bon Voyage Liquor Corp.,
New Arrivals Building,
N. Y. Internatl. Airport, Idlewild, NY.

Greeting:

WE COMMAND YOU, that all business and excuses being laid aside, you and each of you appear and attend before the State Liquor Authority of the State of New York, on the 29th day of November, 1960, at 10:00 o'clock in the forenoon of that day or any adjourned date thereof, at 270 Broadway, New York, N. Y. Room 414, to testify and give evidence relating to the business being conducted by Idlewild Bon Voyage Liquor Corp., New York International Airport, at premises located at New York International Airport, N. Y. under the license to sell alcoholic beverages issued by the State Liquor Authority.

AND THAT YOU BRING WITH YOU and then and there produce the following books and papers: all records of

purchases and sales of alcoholic beverages from inception of Business to date.

AND, FOR FAILURE TO ATTEND, you will be liable to pay all loss and damage sustained thereby, and Fifty Dollars in addition thereto, and be subject to such other penalties as are prescribed by law.

WITNESS: THE STATE LIQUOR AUTHORITY OF THE STATE OF NEW YORK, the 22nd day of November One Thousand Nine Hundred and Sixty.

WALTER C. SCHMIDT
Deputy Commissioner

Exhibit B Annexed to Tuttle Affidavit

(Opinion and Order of Judge Bicks, Dated November 4, 1960)

(Printed herein at pages 49a to 55a.)

Exhibit C Annexed to Tuttle Affidavit

(Notice of Appeal, Dated November 16, 1960)

(Printed herein at page 56a.)

Plaintiff's Supplemental Notice of Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Dated December 1, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of Charles H. Tuttle, verified December 1, 1960; the annexed affidavit of John F. Kelly, verified December 1, 1960; upon the decision and order of Honorable Alexander Bicks herein, dated and filed November 4, 1960; upon the pleadings and all the proceedings heretofore had herein, the plaintiff will move this Court at Room 506, United States Court House, Foley Square, New York, N. Y., on the 6th day of December, 1960, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order enjoining and restraining the defendants, and each of them, from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business during the pendency of this action.

PLEASE TAKE FURTHER NOTICE that this motion will be brought on for hearing together with and supplementary to the plaintiff's application, by Order to Show Cause issued November 25, 1960, by the Honorable Lloyd F. MacMahon, for an order quashing a certain subpoena dated November 22, 1960, directed to the plaintiff and issued by the New York State Liquor Authority, of which the defendants are the Chairman, Members and Commissioners, respectively.

Plaintiff's Supplemental Notice of Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Dated December 1, 1960

PLEASE TAKE FURTHER NOTICE that the plaintiff will apply for, and will renew its application for, the empaneling of a three-judge court, pursuant to 28 U. S. C. §§2281-2284, to determine this supplemental motion and the aforesaid application if and to the extent that such a three-judge court may be required by law.

PLEASE TAKE FURTHER NOTICE that the plaintiff will move for such other and further relief as may be just.

Dated: New York, N. Y., December 1, 1960.

Yours, etc.

Kelly & Schwartz
Attorneys for Plaintiff

To:

Honorable Louis J. Lefkowitz
Attorney General of the State of New York
Attorney for Defendants

Supplemental Affidavit of Charles H. Tuttle in Support of Supplemental Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Verified December 1, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

State of New York, }
County of New York, } ss.:

CHARLES H. TUTTLE, being duly sworn, says: I am counsel for the plaintiff.

Nature of this Supplemental Motion

1. I make this affidavit in support of the plaintiff's supplemental motion to enjoin and restrain the defendants, being the Chairman, Members and Commissioners, respectively, of the New York State Liquor Authority, from hindering, affecting or in any way interfering with the plaintiff or its business during the pendency of this action.

2. This motion is returnable simultaneously with the plaintiff's application, by order to show cause issued by the Honorable Lloyd F. MacMahon on November 25, 1960, for an order quashing a subpoena, dated November 22, 1960, directed to the plaintiff and issued by the New York State Liquor Authority of which the defendants, as already noted, are the Chairman, Members and Commissioners, respectively.

Supplemental Affidavit of Charles H. Tuttle in Support of Supplemental Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Verified December 1, 1960

History of this Action

3. As stated in my affidavit in support of the aforesaid order to show cause, the plaintiff sells liquor solely for export at premises leased from the New York Port Authority at Idlewild Airport.

4. This action is brought pursuant to Chapter 155 of the Judicial Code, 28 U.S.C. §§2281-4, for an injunction restraining the defendants from attempting to enforce the New York Alcoholic Beverage Control Law against the plaintiff because the provisions of that Law, as attempted to be applied to the plaintiff, would be unconstitutional and repugnant to the Commerce Clause, the Supremacy Clause and the clause prohibiting a state from laying impost or duties upon imports or exports without the consent of Congress, in violation of the Federal Constitution. The complaint also alleges that application to the plaintiff of the New York State Alcoholic Beverage Control Law would trespass and infringe upon the scheme adopted by Congress for the encouragement of exports of bonded wines and liquors pursuant to the Tariff Act of 1930 as amended, 19 U.S.C. §1311, and regulations thereunder, together with the applicable provisions of the Federal Internal Revenue Code, 26 U.S.C. §§5521 and 5522.

5. The defendants moved to dismiss this action on the ground, among others, that it presents no actual controversy and that the plaintiff should be remitted to the State courts to pursue its remedies there in the first instance.

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6. In their supporting brief the defendants asserted:

> "The complaint makes no claim that the State Liquor Authority is threatening, directly or indirectly, to take steps to interfere with plaintiff's operations. Since the plaintiff is a non-licensee, there is no real action the State Liquor Authority can take against the plaintiff."

The plaintiff's motions to empanel a three-judge court and for a temporary injunction, together with the defendants' cross-motion to dismiss, came on before Judge Bicks.

7. In his decision of November 4, 1960, Judge Bicks, evidently relying on the aforesaid representations made by the defendants, held that this case was then in a "tentative and hypothetical posture" and that the plaintiff should be remitted to the State courts in the first instance. Accordingly, Judge Bicks refused the interlocutory injunctive relief sought by the plaintiff and denied the plaintiff's motion to empanel a three-judge court; but retained jurisdiction with leave to renew.

8. The plaintiff promptly appealed Judge Bicks' denial of injunctive relief.

The Defendants' Retaliatory Action

9. Five days after the plaintiff's notice of appeal was served on the defendants' attorney on November 17, 1960, the State Liquor Authority issued the *subpoena duces tecum*, dated November 22, 1960, which is the subject of

Supplemental Affidavit of Charles H. Tuttle in Support of Supplemental Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Verified December 1, 1960

the plaintiff's application to quash, returnable simultaneously with this motion.

10. Notwithstanding the defendants' representations before Judge Bicks that "since the plaintiff is a non-licensee, there is no real action the State Liquor Authority can take against the plaintiff", the subpoena required the plaintiff to appear and testify concerning its business "under the license to sell alcoholic beverages issued by the State Liquor Authority".

11. The plaintiff obtained its order to show cause to quash the subpoena late in the afternoon of Friday, November 25, 1960, from the Honorable Lloyd F. MacMahon of this Court, and the order to show cause was duly served on the attorney for the defendants on November 28, 1960.

Two days later, on November 30, 1960, as appears from the annexed affidavit of John F. Kelly, the defendants attempted to shut off the plaintiff's supply of bonded liquors, thereby driving the plaintiff out of business, by representations to the interstate trucking firm which made deliveries to the plaintiff from its out-of-state suppliers, to which the plaintiff had been driven as a result of the refusal of the plaintiff's usual suppliers to fill the plaintiff's orders as a result of the opinion of the New York Attorney General and the defendants' determination that the plaintiff's business is assertedly illegal under New York law.

Supplemental Affidavit of Charles H. Tuttle in Support of Supplemental Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Verified December 1, 1960

Unless the Defendants are Restrained, the Plaintiff will be Driven out of Business and with Consequent Irreparable Damage

12. Accordingly, I submit, the defendants have gone back on the representations on which they induced Judge Bicks to refuse injunctive relief and to remit the plaintiff to the State court, and are now attempting by every conceivable threat and harassment to prejudice the plaintiff's attempt to secure an adjudication of his rights and to drive him out of business, with consequent irreparable damage.

13. The defendants' retaliatory actions put this case in an entirely new light, and it is no longer in the "tentative and hypothetical posture" which the defendants asserted and Judge Bicks adopted.

14. I therefore respectfully request that the defendants be enjoined and restrained from taking any action to interfere with the plaintiff or its business during the pendency of this action.

15. The plaintiff respectfully requests that a three-judge court be convened if and to the extent that it is necessary to do so to herein determine this application and to grant the plaintiff appropriate relief.

(Sworn to by Charles H. Tuttle on December 1, 1960.)

Affidavit of John F. Kelly in Support of Plaintiff's Supplemental Motion for Temporary Injunction and for Empanelling of a Three-Judge Court, Verified December 1, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

State of New York, }
County of New York, } ss.:

JOHN F. KELLY, being duly sworn, says:

I am an attorney at law, maintaining offices for the practice of law at 1780 Broadway, New York 19, N. Y.

On December 1st, 1960, I called the offices of George's Transportation Co. Inc., at 174 Perry Street, New York City, N. Y., and spoke to Mr. Hanz. He identified himself as Manager of the said company.

Mr. Hanz stated that his company is engaged in the trucking business and is licensed by the United States Bureau of Customs and the New York State Liquor Authority in connection with its foregoing operations; and that his license from the United States Customs Bureau authorized him to transport liquor which was in customs bond and in interstate commerce and for foreign commerce.

I inquired from Mr. Hanz as to an overdue shipment of liquor which had been destined from Baltimore, Maryland, to Idlewild Bon Voyage Liquor Corp., at New York International Airport and for which the said company was the carrier from Baltimore to Idlewild Airport. This liquor was in federal customs bond and was of the class stated in the complaint herein.

Affidavit of John F. Kelly in Support of Plaintiff's Supplemental Motion for Temporary Injunction and for Empanelling of a Three-Judge Court, Verified December 1, 1960

Mr. Hanz stated that two representatives of the State Liquor Authority had visited his office on Wednesday, November 30th, 1960, and he identified the men as Mr. Harry Newman and Mr. Heelan, who had given their telephone numbers as BArclay 7-1616, Extension 7215,—the office of the State Liquor Authority.

Mr. Hanz further stated that the said representatives of the State Liquor Authority, speaking in their official capacity, had warned him that Idlewild Bon Voyage Liquor Corp. is a non-licensed receiver; that therefore he could not lawfully deliver any liquor to that corporation; and that such delivery would be in violation of his license from the Authority.

Mr. Hanz stated to deponent that he could not take a chance on losing his license and therefore he would not make any further deliveries to Bon Voyage Liquor Corp., in view of the warning from the State Liquor Authority.

Deponent inquired whether Mr. Hanz would make an affidavit as to the foregoing facts, and Mr. Hanz stated that he was fearful of losing his license from the State Liquor Authority and therefore he would have to consult with his attorney before he would sign the affidavit as to the foregoing.

(Sworn to by John F. Kelly on December 1, 1960.)

Affidavit of Walter C. Schmidt in Opposition to Plaintiff's Application to Quash Subpoena, Verified December 2, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

State of New York, }
County of New York, } ss.:

WALTER C. SCHMIDT, being duly sworn, says that he is a Deputy Commissioner of the New York State Liquor Authority, and is familiar with the facts and circumstances hereinafter set forth.

The New York State Liquor Authority is engaged presently in an investigation to determine whether any holders of licenses or permits issued by the New York State Liquor Authority are violating the provisions of the Alcoholic Beverage Control Law or the terms of the licenses and permits issued to them by selling or delivering alcoholic beverages to Idlewild Bon Voyage Liquor Corporation, a corporation organized and existing under the laws of the State of New York which is not the holder of any license or permit issued by the New York State Liquor Authority and the extent to which the corporation itself is trafficking in alcoholic beverages in this State.

In the course of such investigation, the New York State Liquor Authority issued and caused to be served upon Idlewild Bon Voyage Liquor Corporation the subpoena which is the subject of the motion now before this Court.

Affidavit of Walter C. Schmidt in Opposition to Plaintiff's Application to Quash Subpoena, Verified December 2, 1960

The proposed examination by the New York State Liquor Authority is for the purpose of eliciting from the corporation information as to the source of the alcoholic beverages it is presently engaged in selling at its place of business at New York International Airport, Jamaica, Queens County, New York, and details as to its method of operation.

It is submitted respectfully that the motion should be denied in all respects.

(Sworn to by Walter C. Schmidt December 2, 1960.)

Affidavit of Philip Watson in Opposition to Plaintiff's Motion for Temporary Injunction, Verified December 5, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

State of New York, }
County of New York, } ss.:

PHILIP WATSON, being duly sworn, deposes and says:

That he is an Assistant Attorney General of the State of New York, in the office of Attorney General Louis J. Lefkowitz, Attorney for the defendants named in the above-entitled action, and is generally familiar with all the facts and circumstances thereof.

This affidavit is made in opposition to the motion of the plaintiff for an order staying the defendants from, among other things, interfering with the plaintiff's business.

Deponent respectfully submits that no facts have been stated in plaintiff's moving papers showing that the State Liquor Authority is interfering with the business operations of the plaintiff, or is threatening or is about to take steps, directly or indirectly, to interfere with plaintiff's business operations, except to refer to a subpoena served upon the plaintiff by the State Liquor Authority demanding that it appear, testify and give evidence relating to its business and to bring with it all records of purchases and sales of alcoholic beverages.

Deponent verily believes and respectfully submits that the real purpose of the plaintiff in making this motion is not only to stay the enforcement of the said subpoena, but also to enjoin the State Liquor Authority from exercising

Affidavit of Philip Watson in Opposition to Plaintiff's Motion for Temporary Injunction, Verified December 5, 1960

the powers and jurisdiction conferred upon it by the New York State Alcoholic Beverage Control Law, particularly §17, subds. 7 and 10, wherein and whereby the State Liquor Authority is authorized to inspect or to provide for the inspection of any premises where alcoholic beverages are sold and to hold hearings, subpoena witnesses, compel their attendance, etc., and to require the production of any books or papers relative to the inquiry.

Your deponent verily believes and respectfully submits that the basic claim of the plaintiff is that the statutes in question as applied to the plaintiff, or if applied to the plaintiff, are unconstitutional.

Your deponent verily believes that a determination of the issues thus raised by the plaintiff, under the decision of Judge Bicks dated November 4, 1960, must be deferred until the State Court has ruled.

Your deponent further believes and respectfully submits that since an appeal has been taken from the order of Judge Bicks, the District Court has no jurisdiction to entertain this motion.

Your deponent also believes and respectfully submits that in all events it has not been shown how any great or irreparable injury could be caused the plaintiff by an exercise of the powers and jurisdiction provided by Alcoholic Beverage Control Law §17, subds. 7 and 10.

WHEREFORE, by virtue of all of the foregoing, your deponent requests that the motion of the plaintiff be denied with costs.

(Sworn to by Philip Watson on December 5, 1960.)

Notice of Entry of Stay Orders

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SIRS:

PLEASE TAKE NOTICE that on the plaintiff's application, by order to show cause issued by the Honorable Lloyd F. MacMahon on November 25, 1960, to quash a certain subpoena *duces tecum* dated November 22, 1960, directed to the plaintiff, and issued by the State Liquor Authority of which the defendants are the Chairman, Members and Commissioners, which order to show cause contains a stay enjoining the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them from taking any action pursuant to the aforesaid subpoena, there has been endorsed a further stay as follows:

> "Stay continued pending determination of motion. 12/7/60.
>
> /s/ Edward J. Dimock,
> U. S. D. J."

PLEASE TAKE FURTHER NOTICE, that on the plaintiff's Supplemental Notice of Motion, dated December 1, 1960, for an order, among other things, enjoining and restraining the defendants, and each of them, from taking any action to hinder, harass or in any manner interfere with

the plaintiff or the plaintiff's business during the pendency of this action, there has been endorsed a stay as follows:

> "Stay granted pending determination of motion. 12/7/60.
>
> /s/ Edward J. Dimock,
> U. S. D. J."

Kelly & Schwartz
Attorneys for Plaintiff

To:

Honorable Louis J. Lefkowitz
Attorney General of the State
of New York

Hyman Amsel, Esq., Counsel
State Liquor Authority

Opinion of Judge Dimock, Dated December 28, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM

DIMOCK, D.J.

Plaintiff makes two motions, one for an injunction restraining defendants, constituting officials of the New York State Liquor Authority, from taking any action to hinder, harass or in any manner interfere with plaintiff or plaintiff's business during the pendency of this action, and the other to quash a subpoena issued by defendants requiring appearance and production of records by plaintiff.

The action is one for declaratory judgment that, as applied to plaintiff, section 3 subdivision 28, section 62, and section 100 subdivisions 1 and 2 of the Alcoholic Beverage Control Law of the State of New York and all other provisions of said law which defendants might claim would affect plaintiff's operation are unconstitutional under the commerce clause, U. S. Const. art. 1, §8, and the clause prohibiting states from imposing duties on imports and exports without the consent of Congress, U. S. Const. art. 1, §10, and as being preempted by the Tariff Act of 1930, 19 U. S. C. §1311, and by associated provisions of the Internal Revenue Code, 26 U. S. C. §§5521 and 5522. The complaint also seeks an injunction against the enforcement of those provisions of the Alcoholic Beverage Control Law.

A motion for a preliminary injunction in the terms of that prayed for in the complaint was denied by Judge Bicks with an opinion dated November 4, 1960.

Opinion of Judge Dimock, Dated December 28, 1960

Insofar as the present motion seeks a preliminary injunction it is a mere renewal of the motion made before Judge Bicks. An appeal from his order denying that motion is now pending undetermined in the Court of Appeals. That appeal removed the subject matter of the motion for a preliminary injunction from this court to the Court of Appeals and this court is without jurisdiction to issue a preliminary injunction in those terms. Rico Mfg. Co., Inc. v. Trico Products Corp., 1 Cir., 75 F. 2d 706, 707; Brick v. A. I. Namm & Sons, Inc., D.C.E.D.N.Y., 21 F. 2d 179. Doubtless the appeal would not have that effect if a state of facts which might have warranted a different decision by Judge Bicks were presented. The sole reason assigned by Judge Bicks for denial of the motion was, however, that plaintiff had not exhausted the state remedies open to him. Nothing has occurred since the decision which would tend to obviate the necessity of exhausting state remedies. I am thus without jurisdiction to grant an injunction pendente lite.

Plaintiff, however, seeks in the alternative an injunction pending appeal. No such application was ever made to Judge Bicks so that the question is an open one. I do not regard it as the same as the question which he decided when he denied the motion for an injunction pendente lite. Less need be shown to warrant an injunction pending an appeal than one for an injunction pendente lite.

In support of this branch of its application plaintiff invokes Rule 62(c) F. R. Civ. P. which provides:

> "(c) Injunction pending appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of

> the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party."

Plaintiff has a place of business in Idlewild Airport. I will describe its business as plaintiff describes it in its papers. Its customers are prospective travelers to foreign countries from Idlewild Airport. They order and pay for liquor which plaintiff places on the plane with the passenger but to which the passenger has no access until his arrival in the foreign country. This liquor comes from Government bonded warehouses under bond until delivery on board the airplane and is not subject to United States tax so that it can be purchased at a substantial saving. Plaintiff has made arrangements with the United States Customs Bureau and the Internal Revenue Department under which permission to carry on this business has been granted.

The Attorney General of the State of New York has issued an opinion to the effect that the business so carried on by plaintiff is unlawful under the New York Alcoholic Beverage Control Law. Defendants have therefore advised plaintiff that they have determined that the operation of plaintiff's business is in conflict with the laws of the State of New York and is therefore illegal. Plaintiff made proof before Judge Bicks that the New York Importers & Distillers Association had circularized its members advising that, in view of the position of the Attorney General, under section 62 of the Alcoholic Beverage Control Law, they could not legally fill plaintiff's orders. Judge Bicks found that plaintiff has not since then been able to make purchases or meet its requirements and that it faces the prospect of closing its doors with consequential damage.

Opinion of Judge Dimock, Dated December 28, 1960

In spite of this, Judge Bicks refused a preliminary injunction pendente lite because plaintiff did not exhaust the state remedies available to it. Were the question before me the same as that before Judge Bicks, even had I jurisdiction to pass on the question and reach a different result I would be constrained to follow Judge Bicks. The question before me is not, however, the same. The application before him was for an injunction pending trial and I am now considering an application for an injunction pending appeal. The hardship to the defendant of an injunction pending appeal is lighter than the injunction pending trial by just so much as the duration of the injunction pending trial exceeds the duration of an injunction pending appeal. Thus I may consider the application for an injunction pending appeal as a new question. I find that the hardship to plaintiff in the disruption of its business outweighs such hardship as the Liquor Authority might suffer during the comparatively short period of time required for the presentation and decision of the appeal. Plaintiff has presented evidence that defendants have notified at least one of the truckers delivering merchandise to plaintiff that the trucker is assisting in violations of the law and that the trucker is consequently refusing to make deliveries. Defendants openly avow their purpose to obtain, by means of a subpoena which has been served, the names of those who are supplying merchandise to plaintiff and it is a fair inference that the suppliers will be warned against aiding and abetting the performance of the allegedly illegal acts. Plaintiff certainly raises a serious legal issue when it states that what New York is regarding as unlawful has been ruled by the United States to be lawful foreign commerce. Plaintiff is entitled to an injunction against harassment by defendant pending the appeal from the order of Judge Bicks.

Opinion of Judge Dimock, Dated December 28, 1960

There remains the matter of the motion to quash the subpoena. An affidavit submitted on behalf of defendants states that the purpose of the examination sought is two-fold: first, to get the names of plaintiff's suppliers and, second, to ascertain whether plaintiff is violating the law.

Plaintiff is entitled, for the reasons above set out, to an injunction pending the appeal forbidding communication by defendants with any of plaintiff's suppliers whose names appear in any evidence or testimony obtained by plaintiff as a result of the subpoena and the injunction will so provide.

I pass now to the phase of the motion to quash the subpoena directed at the subpoena insofar as it seeks merely an examination on the subject of violations of law by plaintiff. Even if I were disposed to grant that relief I could not do so in this law suit. Neither by its allegations of fact nor by its prayer does the complaint raise any issue as to defendants' right to subpoena plaintiff to give testimony as to whether it is conducting operations more extensive than those for which plaintiff seeks protection.

Since the injunction will protect plaintiff, pending the appeal, against use against it of the fruits of the subpoena insofar as they constitute evidence with respect to its avowed activities and since I have no power in this law suit to quash the subpoena insofar as it seeks evidence of other alleged infractions of law, the motion to quash will be denied.

Settle order on notice. Bond in the sum of $1,000 will be required. All existing stays are continued pending entry of the order.

Dated: December 28, 1960

E. Dimock
United States District Judge

Order of Judge Dimock, Dated January 4, 1961

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

The plaintiff having moved for an order temporarily enjoining and restraining defendants, and each of them, from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business during the pendency of this action or, in the alternative, during the pendency of the plaintiff's appeal from the decision and order of the Honorable Alexander Bicks herein, dated November 4, 1960; and the plaintiff having further applied for, and renewed its application for, the empanelling of a three-judge court; and the plaintiff having further applied for an order quashing a certain subpoena *duces tecum*, dated November 22, 1960 and returnable November 29, 1960, directed to the plaintiff, and issued by the New York State Liquor Authority of which the defendants are the Chairman, Members and Commissioners respectively; and said motions having duly come on to be heard before me on December 7, 1960; and Kelly & Schwartz, attorneys for plaintiff, by Charles H. Tuttle, Esq., having appeared in support thereof, and Louis J. Lefkowitz, Esq., attorney for defendants, by Philip Watson, Esq., having appeared in opposition thereto;

Now, on reading and filing the plaintiff's application to quash the aforesaid subpoena *duces tecum* by order to show cause issued by the Honorable Lloyd F. MacMahon on November 25, 1960, the affidavit of Charles H. Tuttle, verified November 25, 1960, together with the exhibits annexed thereto, in support of the said application, and the affidavit of Walter C. Schmidt, verified December 2, 1960, in opposition thereto; the plaintiff's supplemental

notice of motion, dated December 1, 1960, for a temporary injunction and for other relief, as aforesaid, the supplemental affidavit of Charles H. Tuttle, verified December 1, 1960, the affidavit of John F. Kelly, verified December 1, 1960, and the affidavit of John F. Kelly, verified December 5, 1960, all in support of the said motion, and the affidavit of Philip Watson, verified December 5, 1960, in opposition thereto, and due deliberation having been had thereon, and on filing the opinion of the Court, dated December 28, 1960, it is hereby

ORDERED that the plaintiff's motion for a temporary injunction pending the trial of this action and for the empanelling of a three-judge court be, and the same hereby is, denied; and it is further

ORDERED that the plaintiff's application to quash the aforesaid subpoena *duces tecum* be, and the same hereby is, denied; and it is further

ORDERED that the plaintiff's motion for an order temporarily enjoining and restraining the defendants, from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business during the pendency of the plaintiff's appeal from the decision and order of the Honorable Alexander Bicks herein, dated November 4, 1960, be, and the same hereby is, granted, and the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them are hereby enjoined and restrained from taking any action to hinder, harass, or in any manner interfere with the plaintiff or the plaintiff's business during the pendency of the aforesaid appeal, and it is further.

Order of Judge Dimock, Dated January 4, 1961

ORDERED that the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them, are hereby enjoined and restrained from communicating with respect to the plaintiff or the plaintiff's business with any of the plaintiff's suppliers whose names appear in any evidence or testimony which may be obtained from the plaintiff as a result of the aforesaid subpoena *duces tecum;* and it is further

ORDERED that the plaintiff will be required to post a bond in the sum of One Thousand Dollars ($1,000.00) pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.

Dated: New York, N. Y., January 4, 1961

EDWARD J. DIMOCK
U. S. D. J.

Plaintiff's Notice of Appeal from Decision and Order of Judge Dimock, Dated January 6, 1961

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SIR:

PLEASE TAKE NOTICE that Idlewild Bon Voyage Liquor Corporation, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the decision and order of the Honorable Edward J. Dimock herein, dated December 28, 1960 and January 4, 1961, respectively, insofar as the said decision and order refused the plaintiff's motion for a temporary injunction pending the trial of this action; denied the plaintiff's motion for the empanelling of a three-judge court; and denied the plaintiff's application to quash a certain subpoena *duces tecum*, dated November 22, 1960, directed to the plaintiff, and issued by the New York State Liquor Authority of which the defendants are the Chairman, Members and Commissioners, respectively.

Dated: New York, N. Y., January 6, 1961.

Yours, etc.

KELLY & SCHWARTZ
Attorneys for Plaintiff

To

Hon. LOUIS J. LEFKOWITZ
Attorney-General of the State of New York
Attorney for Defendants

Notice of Motion to Dismiss Appeal

SIRS:

PLEASE TAKE NOTICE that upon the order of Judge Bicks entered herein on November 4, 1960, denying plaintiff's motion for impanelling a three-judge court and for other relief, and upon the notice of appeal from such order dated November 16, 1960, the undersigned will move this Court for an order dismissing this appeal on the ground that the order appealed from is not appealable, and for such other, further and different relief as this Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that this motion will be brought on for hearing before the United States Court of Appeals for the Second Circuit on the 16th day of January, 1961, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Dated: New York, N. Y., January 12, 1961

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for the Appellees

To:

KELLY & SCHWARTZ, Esqs.
Attorneys for Appellant

Memorandum of Points

The appellees, above-named, intend to raise the following points in support of the motion to dismiss the appeal.

This Court lacks jurisdiction of the appeal.

1. The order appealed from is not a final decision within the meaning of 28 U. S. C., Section 1291.

2. The order appealed from is not an interlocutory order refusing an injunction within the meaning of 28 U. S. C., Section 1292.

Consequently, this Court cannot review the decision appealed from.

Dated: New York, N. Y., January 12, 1961

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for the Appellees

To:

Kelly & Schwartz, Esqs.
Attorneys for Appellant

Notice of Motion to Dismiss Appeal

SIR:

PLEASE TAKE NOTICE that upon the order of Judge Edward J. Dimock dated January 4, 1961 and entered herein on January 6, 1961 denying plaintiff's motion for a temporary injunction, denying motion for the impanelling of a three-judge court, and denying plaintiff's application to quash a subpoena duces tecum; and upon the notice of appeal from such order dated January 6, 1961, the undersigned will move this Court for an order dismissing this appeal on the ground that the order appealed from is unappealable, and for such other, further and different relief as this Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that this motion will be brought on for hearing before the United States Court of Appeals for the Second Circuit on the 16th day of January, 1961, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard.

Dated: New York, N. Y., January 12, 1961

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellees

To:

KELLY & SCHWARTZ, Esqs.
Attorneys for Plaintiff

Memorandum of Points

The appellees, above named, intend to raise the following points in support of the motion to dismiss the appeal:

The Court Lacks Jurisdiction of the Appeal

1. The order appealed from is not a final decision within the meaning of Title 28 U. S. C. §1291.

2. The order appealed from is not an interlocutory order refusing an injunction within the meaning of Title 28 U. S. C. §1292.

Consequently, this Court cannot review the decision appealed from.

Dated: New York, N. Y., January 12, 1961

Yours, etc.,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Appellees

To:

Kelly & Schwartz, Esqs.
Attorneys for Plaintiff

Order

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of January, one thousand nine hundred and sixty-one.

Present:

Hon. HAROLD R. MEDINA,
Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH,
Circuit Judges.

A motion having been made herein by counsel for the appellees to dismiss the appeal of November 4, 1960 for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is adjourned to February 6, 1961 on condition that the appellant shall have filed his brief and appendix prior thereto.

Further ordered that the time to file the appellees' brief be and it hereby is extended until one week after said motion has been decided.

Order

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of January, one thousand nine hundred and sixty-one.

Present:

Hon. HAROLD R. MEDINA,
Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH,
Circuit Judges.

A motion having been made herein by counsel for the appellees to dismiss the appeal of December 28, 1960 for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is adjourned to February 6, 1961 on condition that the appellant shall have filed his brief and appendix prior thereto.

Further ordered that the time to file the appellees' brief be and it hereby is extended until one week after said motion has been decided.

Opinion of the Court of Appeals for the Second Circuit

Before:

LUMBARD, *Chief Judge*,
MADDEN, *Judge, United States Court of Claims*,*
and WATERMAN, *Circuit Judge*.

Motions to dismiss appeals from orders of the United States District Court for the Southern District of New York, Alexander Bicks, J., Edward J. Dimock, J., denying motions to impanel a three-judge district court, for a preliminary injunction, and to quash a subpoena, and staying further proceedings pending state court adjudication.

Motions to dismiss granted.

KELLY & SCHWARTZ (Breed, Abbott & Morgan, Charles H. Tuttle, John F. Kelly, Stoddard B. Colby, Stuart H. Johnson, Jr. of counsel), New York City, *for Plaintiff-Appellant*.

LOUIS J. LEFKOWITZ, Attorney General of the State of New York (Philip Watson, Assistant Attorney General, of counsel), Albany, New York, *for Defendants-Appellees*.

WATERMAN, *Circuit Judge*:

Plaintiff filed a complaint against the defendants, members of the State Liquor Authority of the State of New York. It sought declaratory and injunctive relief from actions taken by them pursuant to the New York Alcoholic Beverage Control Law of the State of New York §§3(28), 62 and 100. Plaintiff alleges that defendants' activities were unconstitutional under the U. S. Constitution, being repugnant to (a) the commerce clause, and (b) the clause

* Sitting by designation.

that prohibits a state, without the consent of Congress, from laying any imposts or duties on imports or exports.

Plaintiff applied to the United States District Court for the Southern District of New York, pursuant to 28 U. S. C. §§2281, 2284, for the convening of a three-judge court to hear and determine the controversy. The single-judge district court issued an order directing the defendants to show cause before a three-judge district court why the relief sought by the plaintiff should not be granted. Before the order to show cause came on to be heard defendants moved to dismiss the complaint. It would appear that the application for the impaneling of a three-judge district court, the order to show cause, and the motion to dismiss were simultaneously heard by Judge Bicks, who denied the application for a three-judge district court, and, in effect, granted defendants' motion to dismiss (188 F. Supp. 434 (1960)). The ground for Judge Bicks' action was that no state court had passed upon the constitutional issues raised, and he was of the opinion that the federal courts should abstain from doing so until there had been state adjudication. Implicit in this disposition and opinion is a finding that a substantial federal question existed which could properly be considered by a three-judge district court after some intervening state adjudication. Plaintiff was given leave to renew its motion after a state court had ruled—whenever there should be such a ruling. It should be noted that no state court action involving these parties or these issues was pending at the time.

From this decision and order, *Idlewild Bon Voyage Liquor Corporation* v. *Rohan*, 188 F. Supp. 434 (S. D. N. Y. Nov. 4, 1960) plaintiff filed a notice of appeal, and thereafter plaintiff obtained an order to show cause why defendants should not be enjoined and restrained from interfering with plaintiff's business during the pendency thereof. It also sought to quash an administrative sub-

poena *duces tecum* the defendants issued under the authority of the New York State Beverage Control Law to appear before defendants with its books, and renewed its application for the impaneling of a three-judge district court. Judge Dimock, after a hearing, granted the motion for the interlocutory injunction pending the appeal; denied the motion to quash; and, relying upon Judge Bicks' decision, refused to impanel a three-judge district court. Appellant appeals to us from the rulings adverse to it entered by both judges. Defendants-appellees have now moved for an order dismissing both appeals on the ground that we lack jurisdiction to hear them.

We are of the opinion that we must grant appellees' motion and are required to dismiss these appeals for lack of appellate jurisdiction.

I—*The Order of Judge Bicks*

This order denied the petition to convene a three-judge district court because there had been no prior state adjudication of the issues. The judge relied upon the doctrine of "equitable abstention" originally set forth in *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941) "that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them."[1] There was, however, as we have previously pointed out, no state action pending. Judge Bicks "retained jurisdiction" of the litigation pending state court adjudication. Appellees' argument that this order was not final and hence unappealable under 28 U. S. C. §1291, 1292 is not well taken. No parallel state

1. *Harrison* v. *N.A.A.C.P.*, 360 U. S. 167, at 176-77. And see Note, 59 Colum. L. Rev. 749 (1959).

actions were pending and there was no state adjudication to await. There was nothing left to be done in the federal courts because the action there had been for all intents and purposes concluded. Appellant was effectively out of court —any action upon its prayer for injunctive relief was indefinitely postponed under these circumstances. There is no bar on this ground to appealability. See *Glen Oaks Utilities, Inc.* v. *City of Houston*, 280 F. 2d 330 (5 Cir. 1960).

However, the order of Judge Bicks had the effect of dismissing a complaint challenging the constitutionality under the Federal Constitution of a state statute and challenging it because of the way that statute was being applied by the regulatory commission created by it. *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10 (1930) in clear and unequivocal terms declared that the three-judge district court was meant to be the tribunal to deal with constitutional challenges to state activity. And, recently, in *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73 (1960) the Court reaffirmed this position by holding that even where state activity was challenged on both constitutional and nonconstitutional grounds a three-judge district court was the proper tribunal. In *Stratton* the Court said that, since this was so, the district judge to whom an application was made for injunctive relief from the state activity was required to convene a three-judge district court. The Court held that if he failed to do so and dismissed the application on its merits the proper remedy was a writ of mandamus from the Supreme Court (see e.g., *Ex Parte Bransford*, 310 U. S. 354 (1940)), for a Court of Appeals would have no jurisdiction over any matter properly entertainable by a three-judge district court. Of course, strict adherence to the *Stratton* command creates obvious difficulties, for whenever there is a pleader's allegation of a constitutional infirmity a single judge is required to re-

quest that a three-judge district court be convened. To deal with this problem a procedure has been developed whereby the district judge to whom the application is made is charged with making a preliminary determination as to whether a "substantial federal question" exists that necessitates the convening of a three-judge district court.[2] Judge Friendly, for our court, in *Bell* v. *Waterfront Commission of New York Harbor*, 279 F. 2d 853 (2 Cir. 1960), traces the development of this procedure, and that case holds that an appeal from a determination that no such substantial federal question exists is properly preferred to the Court of Appeals. Accord, *Stuart* v. *Wilson*, 282 F. 2d 539 (5 Cir. 1960); *Wicks* v. *Southern Pacific Co.*, 231 F. 2d 139 (9 Cir. 1956).

The equitable abstention doctrine referred to by us in this opinion was recently carefully articulated in *Harrison* v. *NAACP*, 360 U. S. 167 (1959), where the Supreme Court remanded a cause for state consideration. The Court reasoned that in order for a federal court to give proper consideration to the issue of constitutionality it should have a finished product before it, i.e., not only the state legislative act but also that act as construed by the state courts. At the same term, in a later opinion, the Court pointed out that a reference of this sort to a state court should not be an automatic reference, *NAACP* v. *Bennett*, 360 U. S. 471 (1959). Moreover, there was no indication that the choice of whether to abstain could be the choice of a single district judge. In *Bennett* the appeal was from and the remand was to a three-judge district court.

The decision to abstain is a very different decision from the preliminary one of determining whether the case in-

2. As previously indicated, a finding that a substantial federal question existed was implicit in Judge Bicks' decision.

volves a substantial federal question. Such a determination, not being automatic, presupposes that the court has jurisdiction to decide the controversy even though it may, after due consideration, choose to surrender temporarily its power to decide. Inasmuch as *Stratton* has made it clear that only a three-judge district court has the requisite jurisdiction to decide a complaint seeking injunctive relief from acts sought to be justified by reliance upon a state statute because the statute, so applied, is repugnant to the federal constitution [3] we are of the opinion that the determination of whether a federal court ought to abstain is a determination that may only be made in the first instance by a three-judge district court.[4]

Stratton v. *St. Louis S. W. Ry., supra*, is undeniable authority for the proposition that no appeal may be preferred to a court of appeals from an action taken by a district judge upon an application to convene a three-judge district court unless there first was jurisdiction in the district court over the subject matter ruled upon. Having decided that Judge Bicks had no jurisdiction to proceed as he did, we must conclude from *Stratton* that we have no jurisdiction to entertain an appeal from his decision. To be sure, this result leaves us in a somewhat anomalous position. A court of appeals as a matter of course entertains appeals that claim a lack of jurisdiction in a district court and a court of appeals so importuned has jurisdiction to determine whether the district court's powers, so challenged, were exercised within district court jurisdiction. Anomalous as our position is, we feel bound by the Supreme Court's opinion in *Stratton*, an opinion which that Court has never seen fit to reverse, and to which it

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3. Accord, *Query* v. *United States*, 316 U. S. 486 (1942).

4. See *Alabama Public Service Comm.* v. *Southern Ry.*, 341 U. S. 341, 350 (1951). Contra, *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 252 F. 2d 317 at 320 (6 Cir. 1958).

has given its approval when construing a companion section, 28 U. S. C. §2282. *Ex Parte Cogdell*, 342 U. S. 163 (1951).

In *Bell* v. *Waterfront Commission of New York Harbor*, *supra*, we first found that the district court could determine the preliminary question of whether there was a substantial federal question to be adjudicated upon, and therefore the court of appeals had jurisdiction to review that preliminary determination. Though the result we reach here of denying to a one-judge district court, and to ourselves, the power similarly to determine a jurisdictional question, the jurisdictional question itself is a quite dissimilar one,[5] and in determining the issue before us we are constrained to follow *Stratton*. Therefore, since we are of the opinion that a three-judge district court should have been convened, it is our duty to grant the motion to dismiss. Accord, *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 252 F. 2d 317, 319 (6 Cir. 1958).

II—*The Order of Judge Dimock*

Falsone v. *United States*, 205 F. 2d 734 (5 Cir.), *cert. denied*, 346 U. S. 864 (1953), held that the denial of a motion to quash a subpoena of an administrative agency, unconnected with litigation, is a final order and therefore appealable. In *In Re Albert Lindley Lee Memorial Hospital*, 209 F. 2d 122 (2 Cir. 1953), *cert. denied sub nom. Cincotta* v. *United States*, 347 U. S. 960 (1954), this court expressly followed the *Falsone* case. There would appear, therefore, under ordinary circumstances to be no doubt as to the appealability of an order denying a motion to quash. However, the order before us on appeal was sought below

5. See *Board of Supervisors* v. *Turcad*, 207 F. 2d 807 (5 Cir. 1953), judgment vacated on other grounds and cause remanded, 347 U. S. 971 (1954).

on the ground that the issuance of the subpoena was repugnant to the federal constitution. In such a situation 28 U. S. C. §2281 requires that a three-judge district court be convened if a substantial federal question exists. *Bell* v. *Waterfront Commission of New York Harbor, supra.* Therefore, though the issue is a different one from the one before Judge Bicks, in considering whether we may entertain the purported appeal we must hold that inasmuch as Judge Dimock exercised power properly exercisable only by a three-judge district court we have no jurisdiction to hear an appeal from his order. This result is required under the *Stratton* doctrine.

The refusal by Judge Dimock to request that a three-judge district court be convened is, of course, subject to the same infirmity that Judge Bicks' refusal was. This order was but a reaffirmation of the earlier decision.

Also, the stay pending appeal granted by Judge Dimock is not an appealable order. It enjoined state activities allegedly repugnant to the federal constitution, and such an injunction was properly issuable only by a three-judge district court.

The results we reach are unhappy ones. We are refusing access to our court to a party who we believe is entitled to relief. However, as we understand *Stratton*, the Supreme Court has determined that we are not the proper tribunal to adjudicate the issues raised by the purported appeals.

Appeals dismissed.

Opinion of the Court of Appeals for the Second Circuit

LUMBARD, *Chief Judge* (dissenting):

Agreeing with my brethren that the orders made by Judges Bicks and Dimock are of the sort which are ordinarily appealable,[1] I would deny the motion to dismiss and would hear the appeals to decide first whether the single district judges had jurisdiction to act as they did and then proceed, if it is found that they did have jurisdiction, to consider the merits.

The appellees argue here, and my brethren agree with them, that even if these orders are appealable in form, no review of the merits may be made by this court. Since an injunction restraining the enforcement of a state statute on the ground that it violates the federal Constitution may be issued only by a three-judge court, 28 U. S. C. §2281, the appellees contend that the single district judge had no jurisdiction to entertain the application, and that this lack of jurisdiction may be attacked only by way of mandamus in the Supreme Court. The appellees, who thus find themselves in the odd posture of urging upon this court lack of jurisdiction in the district court in order to preserve for their benefit the very order which they claim was entered without jurisdiction, cite dictum in *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10 (1930), in support of their position.[2]

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1. See, in addition to the *Glen Oaks Utilities* case cited in the majority opinion, *NAACP* v. *Bennett*, 360 U. S. 471 (1959), where, on appeal from an order of a three-judge court retaining jurisdiction, the Supreme Court considered the merits without discussing the issue of appealability.

2. "If a single judge, thus acting without jurisdiction, undertakes to enter an order granting an interlocutory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this Court, as the statute plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirement. Nor does an appeal

It is clear beyond any doubt that if a district judge, without entering an appealable order, rules that he, sitting alone, will hear a request for an injunction restraining the enforcement of a state statute, the appropriate remedy for a party requesting a three-judge court is by writ of mandamus in the Supreme Court. E.g., *Ex parte Bransford*, 310 U. S. 354 (1940); see Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, 360 (1951 ed.) and authorities there cited. A court of appeals would not then have appellate jurisdiction under 28 U. S. C. §§1291, 1292. Nor would it be proper for a court of appeals itself to enter a writ of mandamus since the courts of appeal have no appellate jurisdiction over cases decided by three-judge district courts and could not, therefore, satisfy the requirement of 28 U. S. C. §1651 that such writs may issue only "in aid of their * * * jurisdictions." See *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, 25 (1943).

In this case, however, the district court has proceeded to enter orders which meet the standards for appellate review prescribed by 28 U. S. C. §§1291, 1292. The appellees urge that nonetheless this court should dismiss the appeals for lack of jurisdiction and leave the appellant with its remedy of mandamus in the Supreme Court. If, in fact, the district judges exceeded their jurisdiction in

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lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this Court.

"Accordingly, where a court of three judges should have been convened, and was not, this Court may issue a writ of mandamus to vacate the order or decree entered by the District Judge and directing him, or such other judge as may entertain the proceeding, to call to his aid two other judges for the hearing and determination of the application for an interlocutory injunction." 282 U. S. 15-16.

entering the orders before us on appeal, we would surely be barred from considering the merits underlying their decisions. 28 U. S. C. §1253 directs that in "any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges" an appeal may be taken from a denial of an interlocutory or permanent injunction directly to the Supreme Court. But I think we have the jurisdiction and the statutory obligation to hear this appeal and first decide whether the orders did exceed the jurisdiction of district judges sitting alone in the district court, and whether the suit was of the kind which should have been presented to a district court of three judges. *Diggs* v. *Pennsylvania Public Utilities Comm'n*, 180 F. 2d 623, 629 (3d Cir. 1950).

If we hold that Judge Bicks was required to impanel a three-judge court, we must vacate his order and that of Judge Dimock for lack of jurisdiction, and we can go no further. *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 266 F. 2d 427, 433 (3d Cir. 1959); *Board of Supervisors* v. *Tureaud*, 207 F. 2d 807 (5th Cir. 1953). But see *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 252 F. 2d 317 (6th Cir. 1958); *Waddell* v. *Chicago Land Clearance Comm'n*, 206 F. 2d 748 (7th Cir. 1953). If, on the other hand, we hold that the issues before the district judges were not for a three-judge court either because the challenge to the state statute was not of the type comprehended by 28 U. S. C. §2281 or because the question of "equitable abstention" is analogous to the threshold jurisdictional determination of a substantial federal question, which is to be decided by the single district judge and reviewed by the court of appeals, *Bell* v. *Waterfront Comm'n*, 279 F. 2d 853 (2d Cir. 1960), we should proceed to the merits as we would in any other case in which the jurisdiction of a district judge is attacked and is upheld. Cf. *Query* v. *United States*, 121 F. 2d 631 (4th Cir. 1941),

vacated on other grounds, 316 U. S. 486 (1942); *Capital Service, Inc.* v. *United States District Court*, 198 F. 2d 18 (9th Cir. 1952).

Jurisdictional questions are surely not beyond the scope of this court's authority. We are often called upon to decide whether diversity jurisdiction was properly exercised by a district court, although in deciding that it was not we must vacate the decision below and oust ourselves of jurisdiction to go any further. Underlying the majority's opinion is the assumption that matters which should be considered only by a three-judge court and by the Supreme Court should not be presented to this court—that supervision over three-judge panels should rest with the Supreme Court only. But even when the issue is whether a case was one as to which original jurisdiction lay exclusively with the Supreme Court, courts of appeal have passed on the jurisdictional issue after a final order was entered and have not required the parties to seek relief by way of mandamus in the Supreme Court. See *United States* v. *State of Washington*, 233 F. 2d 811 (9th Cir. 1956); *Farnsworth* v. *Sanford*, 115 F. 2d 375 (5th Cir. 1940), *cert. denied*, 313 U. S. 586 (1941).

If we were now to decide the jurisdictional question the Supreme Court could, of course, review our determination on certiorari or even by a writ of mandamus. The majority's view, however, imposes on the federal courts a procedure of piecemeal review whereby a court of appeals is always forced to stay its hand whenever an appellant or appellee argues to it that the decision below should have been made by a three-judge court. No matter how worthless such a claim may be, we would not be able to dispose of it on an appeal from a final order but would have to await a decision on a petition for mandamus in the Supreme Court. Only after the Supreme Court decided the jurisdictional question might we be permitted to

consider the merits, and the merits would not be ripe for Supreme Court review until we had passed upon them on remand. I cannot believe that the authority of the Supreme Court over three-judge tribunals was intended to extend so far as to preclude us from deciding the jurisdictional issue when a district judge enters an order that is otherwise appealable under 28 U. S. C. §§1291, 1292, and thereby to impose on the parties a procedure calling for separate appellate consideration of the jurisdictional and substantive questions.

It is true that the dictum in the *Stratton* case, *supra*, appears to indicate that even after an appealable order is entered by the district court, the only means of vacating it is by mandamus in the Supreme Court. But it seems to me that the Supreme Court in *Stratton* was concerned with the effects of appellate review of the *merits* of an unauthorized order entered by a single district judge and did not proscribe ordinary review of matters going to the *jurisdiction* of the single district judge if his order is otherwise appealable. See Hart & Wechsler, The Federal Courts and the Federal System 853 (1953).

For these reasons I would deny the motion to dismiss.

Judgment Dated April 14, 1961

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of April, one thousand nine hundred and sixty-one.

Present:

Hon. J. EDWARD LUMBARD, Chief Judge,
Hon. J. WARREN MADDEN, Judge, Court of Claims
Hon. STERRY R. WATERMAN, Circuit Judge.

Motions having been made herein by counsel for the appellees to dismiss the appeals of November 4, 1960 and December 28, 1960, for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that said motions be and they hereby are granted and that the appeals from orders of the United States District Court for the Southern District of New York be and they hereby are dismissed.

Order to Show Cause Issued April 18, 1961 in the United States District Court for the Southern District of New York by Hon. John M. Cashin

Upon the annexed affidavit of Charles H. Tuttle, verified April 18, 1961, upon the complaint herein and the exhibits annexed thereto, upon the opinion and order of the Honorable Alexander Bicks herein, dated November 4, 1960, the opinion and order of the Honorable Edward J. Dimock herein, dated December 28, 1960 and January 4, 1961, respectively, the opinion of the United States Court of Appeals for the Second Circuit herein, dated April 14, 1961, and upon all the papers heretofore filed and all the proceedings heretofore had herein,

And it appearing to the Court that (1) the actions heretofore threatened and attempted by the defendants against the plaintiff are subject to grave doubt as to their legality under the Constitution and Laws of the United States, (2) such actions, if taken by the defendants in accordance with their threats so to do, would result in irreparable injury to the plaintiff, (3) there are good and sufficient reasons to bring on this motion by order to show cause, and (4) due notice of the hearing on this order to show cause may be given to the Governor and Attorney-General of the State of New York,

LET the defendants, and each of them, show cause before this Court at Room 506, United States Courthouse, Foley Square, New York, N. Y., at 10:00 a.m. on the 25th day of April, 1961, or as soon thereafter as counsel can be heard, why an order should not be entered:

(1) Convening a District Court of three judges pursuant to 28 U.S.C. §2281 for the hearing of this cause and

Order to Show Cause Issued April 18, 1961 in the United States District Court for the Southern District of New York by Hon. John M. Cashin

of the plaintiff's motion for an injunction, both preliminary and permanent, and granting the plaintiff's request, hereby made, that the Chief Judge of the United States Court of Appeals for the Second Circuit be notified, pursuant to 28 U.S.C. §2284, of the presentation of this application for an injunction in order that the necessary designation of three judges for said Court may be made;

(2) Restraining and enjoining the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them from enforcing or attempting to enforce against the plaintiff the provisions of the Alcoholic Beverage Control Laws of the State of New York, particularly Section 3(28), Section 62, Section 100(1) and (2), Section 17(7) and (10) thereof, pending the hearing of the plaintiff's motion, hereby made, for an injunction, both preliminary and permanent, so restraining the defendants by a District Court of three judges;

(3) Restraining and enjoining the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business pending the hearing of the plaintiff's motion, hereby made, for an injunction, both preliminary and permanent, so restraining the defendants by a District Court of three judges; and it is

Ordered, that personal service of this order to show cause and the papers on which it is based upon the Honorable Louis Lefkowitz, Attorney-General of the State of New York, attorney for the defendants, on or before the 19th

Order to Show Cause Issued April 18, 1961 in the United States District Court for the Southern District of New York by Hon. John M. Cashin

day of April, 1961 at 5:00 p.m. shall constitute good and sufficient service of this order to show cause, and it is further

ORDERED that notice of the hearing on this order to show cause be given by mailing a copy thereof by registered mail to the Governor and the Attorney-General of the State of New York at least five (5) days prior to April 25, 1961, the date of the hearing on this order to show cause; and it is further

ORDERED, that the defendants' opposing papers be served on the plaintiff's attorneys by April 24, 1961 at 10:00 a.m.

Dated: New York, N. Y., April 18, 1961.

JOHN M. CASHIN
U. S. D. J.

Affidavit of Charles H. Tuttle in Support of Plaintiff's Application

State of New York, }
County of New York, } *ss.:*

CHARLES H. TUTTLE, being duly sworn, says:

I am counsel for the plaintiff.

Nature of this Application

1. I make this affidavit in support of the plaintiff's application by order to show cause (1) for the convening of a three-judge District Court pursuant to 28 U. S. C. §§2281 and 2284 to hear and determine this action and the plaintiff's motion for an injunction, both preliminary and permanent, and (2) for an order restraining the defendants, being the Chairman, Members and Commissioners, respectively of the New York State Liquor Authority, (a) from enforcing against the plaintiff the provisions of the Alcoholic Beverage Control Law of the State of New York, and (b) from hindering, harassing or interfering with the plaintiff or the plaintiff's business, pending the hearing by a District Court of three judges on the plaintiff's application for a preliminary injunction so restraining the defendants *pendente lite*.

The Recent Decision of the United States Court of Appeals

2. This application is made pursuant to the decision of the U. S. Court of Appeals for the Second Circuit herein, dated April 14, 1961 (Exhibit A hereto) dismissing the plaintiff's appeals from the decisions and orders of Judge Bicks and Judge Dimock, and holding (p. 1444) that "a

three-judge district court should have been convened", as sought by the plaintiff to hear and determine the plaintiff's application for the relief here again requested.

3. The Court of Appeals also stated (p. 1445) that this plaintiff "is entitled to relief".

Nature and History of this Case

4. The history of this case, including the decisions and orders of Judge Bicks and Judge Dimock, is set forth in full in the Appendix to Appellant's Brief in the U. S. Court of Appeals (Exhibit B hereto). The plaintiff's position as to the applicable law is set forth in its Appellant's Brief in U. S. Court of Appeals (Exhibit C hereto). Accordingly, I shall merely undertake to summarize the nature and history of this case to date.

5. The plaintiff, a New York corporation, is engaged in selling bottled liquor exclusively for export to overseas passengers emplaning for foreign countries at Idlewild Airport. Its business is conducted under comprehensive regulation by the U. S. Bureau of Customs.

6. The State Liquor Authority, however, determined that the plaintiff's business "is in conflict with the Laws of the State of New York and, therefore, will be illegal."

7. The result was to dry up the plaintiff's source of supplies in New York State. As Judge Bicks found (Appellant's Appendix 53a, 188 F. Supp. at p. 436):

> "The New York Importers & Distillers Association circularized its members advising that in view of the position of the Attorney General and of §62 of the Alcoholic Beverage Control Law, they could not

legally fill plaintiff's orders. Plaintiff has not since been able to make purchases to meet its requirements and faces the prospect of closing its doors, with consequent substantial damage."

8. Accordingly, the plaintiff instituted this action for a declaratory judgment, with appropriate injunctive relief, that the provisions of the New York Alcoholic Beverage Control Law, as the defendants seek to apply it to the plaintiff's export business, are unconstitutional under (i) the Commerce Clause (ii) the clause prohibiting a State from laying imposts or duties on imports and exports without the consent of Congress and (iii) the Supremacy clause of the Constitution of the United States.

9. The complaint also alleges that the Tariff Act of 1930, 19 U. S. C. §1311, and the regulations thereunder, together with the applicable provisions of the Internal Revenue Code, 26 U. S. C. §§5521 and 5522, constitute a comprehensive, exclusive and preemptive scheme adopted by Congress for the regulation and promotion of foreign commerce in, and export of, bonded wines and liquors.

10. Judge Bicks, in his decision and order of November 4, 1960 (Appellant's Appendix 51a-57a, 188 F. Supp. 434). refused the plaintiff's initial request for the convening of a three-judge District Court and for a temporary injunction, —the very relief here sought. Instead, Judge Bicks held that the plaintiff should be required to resort to the New York State courts in the first instance, but he retained jurisdiction of this case with leave to the plaintiff to renew its application for the relief here sought "after the state court has ruled".

Affidavit of Charles H. Tuttle in Support of Application

11. The U. S. Court of Appeals, however, citing *Stratton* v. *St. Louis S.W. Ry.*, 282 U. S. 10, held (pp. 1442, 1443, 1444):

> "* * * we are of the opinion that the determination of whether a federal court ought to abstain is a determination that may only be made in the first instance by a three-judge district court.
>
> * * *
>
> "Having decided that Judge Bicks had no jurisdiction to proceed as he did, we must conclude from *Stratton* that we have no jurisdiction to entertain an appeal from his decision.
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> * * *
>
> "Therefore, since we are of the opinion that a three-judge district court should have been convened, it is our duty to grant the motion to dismiss."

12. In the *Stratton* case, thus cited by the Court of Appeals as determinative in this case, the Supreme Court held (282 U. S. at p. 18) that although the remedy by mandamus to require the convening of a three-judge District Court was still available,

> "It is not necessary, however, that formal application should be made for such a writ, as the District Judge may now proceed to take the action which the writ, if issued, would require."

13. Thus the Court of Appeals has now held that the plaintiff is entitled to have a three-judge District Court convened in this case, and the Supreme Court in the *Stratton* case has held that a formal application to it for mandamus is "not necessary * * * as the District Judge may now proceed to take the action which the writ, if issued, would require".

14. The Appellant's Brief in the Court of Appeals fully sets forth the reasons why in the plaintiff's view, the three-judge District Court should exercise,—not abdicate, its statutory jurisdiction to hear and determine this case. Accordingly, I shall not repeat those reasons here.

15. After the plaintiff appealed from Judge Bicks' decision, the State Liquor Authority retaliated by attempting to choke off the plaintiff's life-line of supply from out-of-State sources to which the plaintiff had been driven because its New York suppliers had been frightened off by the defendants' prior determination of illegality.

16. This effort to drive the plaintiff out of business before it could obtain a federal adjudication of its federal rights was attempted first under color of State law by an administrative *subpoena duces tecum* directed to the plaintiff and admittedly designed to ascertain the identity of the plaintiff's suppliers and truckers (Appendix to Appellant's Brief 84a-85a).

17. When they were temporarily restrained by Judge MacMahon's order to show cause from proceeding pursuant to the subpoena, however, the defendants resorted to overt threats to the several U. S. Customs bonded interstate truckers who had been making deliveries to the plaintiff (Appendix to Appellant's Brief 59a-60a, 78a, 80a-83a).

18. The plaintiff's applications for injunctive relief against such overt harassment and interference came on before Judge Dimock who rendered a decision and order granting a stay restraining the defendants from such activity pending the plaintiff's appeal. Judge Dimock, however, denied the plaintiff's motion for a similar injunction

pendente lite, for the empanelling of a three-judge District Court and for an order quashing the *subpoena duces tecum*.

19. The Court of Appeals dismissed the plaintiff's appeal from Judge Dimock's denials of the relief it sought holding (p. 1444) that since "a substantial federal question exists * * * Judge Dimock exercised power exercisable only by a three-judge district court". The Court of Appeals added (p. 1445):

> "Also, the stay pending appeal granted by Judge Dimock is not an appealable order. It enjoined state activities allegedly repugnant to the federal constitution, and such an injunction was properly issuable only by a three-judge district court."

20. The Court of Appeals concluded (p. 1445):

> "The results we reach are unhappy ones. We are refusing access to our court to *a party who we believe is entitled to relief*." (Emphasis added.)

21. The plaintiff now seeks the relief to which the Court of Appeals, in the plaintiff's view, has said it is entitled. Plaintiff's reasons for believing that it is entitled to such relief are set forth in the Appellant's Brief in the Court of Appeals (pp. 38-43) and need not be repeated here.

There Are "Good And Sufficient Reasons" For Proceeding Here By Order To Show Cause

22. Although the Court of Appeals held (p. 1445) that "the stay pending appeal granted by Judge Dimock * * * was properly issuable only by a three-judge district court," the Clerk of the Court of Appeals has advised my office

that Judge Dimock's stay remains in effect until April 29, 1961, when the mandate will issue fifteen days after the decision of the Court of Appeals on April 14, 1961. (Rule 28(b) of the U. S. Court of Appeals for the Second Circuit).

23. Under new Rule 9(c)(2) of this Court ten days' notice of motion is required for an application of this character unless there are "good and sufficient reasons" for resorting to an order to show cause.

24. Under Rule 9(o)(2), however, motions requesting relief of the type here sought are to be heard on Tuesdays "unless the judge assigned to the Motion Part otherwise directs."

25. Accordingly, the first Tuesday for which this application could be brought on for hearing on ten days' notice would be May 2, 1961,—three days after the issuance of the mandate of the Court of Appeals and the consequent expiration of Judge Dimock's stay restraining the defendants from harassment or interference with the plaintiff or its business.

26. Accordingly, the plaintiff's past experience furnishes "good and sufficient reasons" for resorting to an order to show cause here so that this application for an appropriate stay continuing and amplifying the stay granted by Judge Dimock, may be heard and determined by this Court before Judge Dimock's stay expires.

27. The one week notice will provide ample time to give the statutory five days' notice of the hearing to the Governor and the Attorney-General of the State of New York as required by 28 U. S. C. §2284(2).

Affidavit of Charles H. Tuttle in Support of Application

28. Furthermore, one week should provide ample time for the Attorney-General of the State of New York, who represents the defendants here and is fully familiar with every step of this case, to formulate his position on this application. Accordingly, since Rule 9(c)(2) of this Court contemplates service of answering papers three days before the return day, the order to show cause provides for service of the defendants' papers one day prior to the hearing.

29. No previous application has been made for the relief herein sought except to the extent stated above.

WHEREFORE, I respectfully submit that the plaintiff is plainly entitled under the decision of the Court of Appeals to the convening of a three-judge District Court and to the interim relief here requested. Accordingly, I respectfully request that this order to show cause issue as prayed.

(Sworn to by Charles H. Tuttle on April 18, 1961.)

Restraining Order Issued by Judge Cashin on April 25, 1961

The plaintiff having moved by order to show cause dated April 18, 1961, for an order convening a District Court of three judges pursuant to 28 U. S. C. §2281 for the hearing of this cause and for an injunction, both preliminary and permanent, restraining the defendants from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business, and for other relief, and said motions having duly come on to be heard before me on April 25, 1961; and Kelly & Schwartz, attorneys for plaintiff by Charles H. Tuttle, Esq., having appeared in support thereof, and Louis J. Lefkowitz, Esq., attorney for defendants, by Philip Watson, Esq., having appeared in opposition thereto;

Now, on reading and filing plaintiff's aforesaid application by order to show cause issued by Honorable John M. Cashin on April 18, 1961; and the affidavit of Charles H. Tuttle, verified April 18, 1961, together with the exhibits annexed thereto, in support of the said application, and after hearing argument by Charles H. Tuttle, Esq., in support of the said application and by Philip Watson, Esq., in opposition thereto, and it appearing to the Court that the plaintiff may be irreparably damaged unless the Court continues the temporary injunction heretofore granted by the Honorable Edward J. Dimock herein by order dated January 4, 1961 pending the determination of plaintiff's aforesaid application for the convening of a three-judge District Court, it is hereby

Ordered, that the plaintiff's motion for an order temporarily enjoining and restraining the defendants from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business pending the decision on the plaintiff's application for an order con-

vening a three-judge Court herein be, and the same hereby is, granted, and the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them are hereby enjoined and restrained from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business pending the determination of the aforesaid application, and it is further

ORDERED, that the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them, are hereby enjoined and restrained from communicating with respect to the plaintiff or the plaintiff's business with any of the plaintiff's suppliers whose names appear in any evidence or testimony which may be obtained from the plaintiff by the defendants; and it is further

ORDERED that the bond in the sum of $1,000, heretofore posted by the plaintiff pursuant to the order of the Honorable Edward J. Dimock herein, dated January 4, 1961, shall be proper security pursuant to Rule 65(c) of the Federal Rules of Civil Procedure.

Dated: New York, N. Y., April 25, 1961.

Signed at 5:15 P.M.
John M. Cashin
U. S. D. J.

JOHN M. CASHIN
U. S. D. J.

Opinion and Order of Judge Cashin in the United States District Court for the Southern District of New York

Appearances:

KELLY & SCHWARTZ, Esqs.,
Attorneys for Plaintiff
1780 Broadway, New York, N. Y.

Charles H. Tuttle, Esq.
John F. Kelly, Esq.
Stoddard B. Colby, Esq.
Stuart H. Johnson, Jr., Esq.
Of Counsel.

HON. LOUIS J. LEFKOWITZ,
Attorney General of the State of New York
Attorney for Defendants
80 Centre Street, New York, N. Y.

Philip Watson, Esq.
Assistant Attorney General
Of Counsel.

CASHIN, D. J.

This is a motion to impanel a three-judge district court pursuant to 28 U. S. C. §2281 brought on by an order to show cause. The plaintiff, a New York corporation, is engaged in selling bottled wines and liquors solely for export to overseas passengers from premises at Idlewild Airport. The defendants are the Chairman, Members and Commissioners of the New York State Liquor Authority.

The liquor sold by plaintiff is placed upon the passengers' planes for delivery only upon arrival at their foreign destinations. The liquor cannot be diverted for any purpose other than export from the United States. The United

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States Treasury Department, Bureau of Customs, has approved plaintiff's procedures and has ruled that plaintiff's business constitutes the exportation of merchandise within the meaning of Section 311 of the Tariff Act of 1930, 19 U. S. C. §1311.

The United States Bureau of Customs has approved and supervises the plaintiff's premises. The liquors sold by plaintiff are purchased solely for export from vendors who withdrew the same from Class 6 United States Government bonded manufacturing and United States Customs bonded warehouses for re-warehousing at the United States Customs-controlled space in plaintiff's premises. Pursuant to the Internal Revenue Code, each bottle plaintiff withdraws is labeled "Bottled for export from the U. S. A.".

Plaintiff sought a ruling from the New York State Liquor Authority as to whether its conduct set forth above contravenes the New York State Alcoholic Beverage Control Law. The State Liquor Authority sought and obtained an opinion from the New York State Attorney General (See 1960, Op. Atty. Gen. June 30) which was to the effect that the plaintiff's business constituted a "sale" within the meaning of the Alcoholic Beverage Control Law, §3(28); that there is no provision of that law which would authorize a license for such sales, and that no person can sell alcoholic beverages within New York without a license. Thereafter, the New York Importers and Distillers Association circularized its members advising that in view of the position of the Attorney General and of §62 of the Alcoholic Beverage Control Law they could not legally fill plaintiff's orders.

This action was then instituted on July 22, 1960. The plaintiff urged at that time that the provisions of the New York State Alcoholic Beverage Control Law are uncon-

stitutional, as applied to plaintiff, under (i) the Commerce clause; (ii) the clause prohibiting a State from laying imposts or duties on imports and exports without the consent of Congress; and (iii) the Supremacy clause of the Constitution of the United States. Plaintiff argued at that time that the 1930 Tariff Act as amended, the regulations adopted thereunder, and the applicable provisions of the Internal Revenue Code, constituted a comprehensive, exclusive and preemptive scheme duly adopted by Congress for the regulation, encouragement and promotion of foreign commerce in bonded liquors.

Plaintiff sought declaratory judgment to that effect, injunctive relief, and moved for the impaneling of a three-judge district court pursuant to 28 U.S.C. §2281, 2284. Judge Bicks of this Court denied plaintiff's motion to impanel a three-judge district court until after a state court has ruled on the constitutional issues. (188 F. Supp. 434 (1960)). Plaintiff appealed Judge Bicks' decision and also moved before Judge Dimock of this Court for an injunction restraining defendants from interfering with plaintiff's business during the pendency of this action, and for other relief not germane to the present motion. Judge Dimock refused to grant a preliminary injunction because the request was a mere renewal of the motion made before Judge Bicks. He did, however, issue an injunction against harassment by defendants pending the appeal from the order of Judge Bicks. Thereafter, the plaintiff appealed from the orders of Judge Bicks and Judge Dimock to the Circuit Court of Appeals.

On April 14, 1961 the Court of Appeals handed down its decision (Idlewild Bon Voyage Liquor Corporation v. Rohan (2 Cir. April 14, 1961) —— F. 2d ——). It stated by way of dictum that a three-judge district court should have been convened. It held, however, that in light of

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Stratton v. St. Louis S. W. Ry., 282 U.S. 10 (1930) it was without jurisdiction to hear the appeals and granted defendants' motion to dismiss them. It said that—

> "In Stratton the Court said that, * * *, the district judge to whom an application was made for injunctive relief from the state activity was required to convene a three-judge district court. The Court held that if he failed to do so and dismissed the application on its merits the proper remedy was a writ of mandamus from the Supreme Court (see e.g., Ex Parte Bransford, 310 U.S. 354 (1940)), for a Court of Appeals would have no jurisdiction over any matter properly entertainable by a three-judge district court."

As I construe the decision of our Circuit Court of Appeals it said that plaintiff's only remedy was by way of mandamus to the Supreme Court of the United States and, accordingly, dismissed the appeals because it had no jurisdiction to hear them. The mandate in this decision has not, as of this date, come down. It is true that the decision of the Circuit Court of Appeals did say that Judges Bicks and Dimock were in error and that a three-judge district court should have been appointed. However, I consider this as dictum. I consider Judge Bicks' and Judge Dimock's orders as still in full force and effect.

Thereafter, and on April 18, 1961, I signed an order directing defendants to show cause why an order should not be entered convening a three-judge district court pursuant to 28 U.S.C. §2281. Thus, I have before me the same issue on which Judge Bicks and Judge Dimock have already ruled. Their decisions are still the law of this case.

Plaintiff argues that on the basis of the dictum in the Court of Appeals decision dismissing the appeals from

Judges Bicks' and Dimock's decisions, I should now convene a three-judge district court. Defendants urge that plaintiff's motion should be denied because the issues are res judicata and that plaintiff's only remaining remedy in the United States courts is mandamus.

Whether or not I have the power to convene a three-judge district court at this time is questionable. In *In re Hines*, (2 Cir. 1937) 88 F. 2d 423, Judge Swan stated:

> "It is well established that a judge may not overrule the decision of another judge of co-ordinate jurisdiction made in the same case. The law enunciated by the first judge is not merely his individual opinion; it is the law of the District Court, to be followed, upon similar facts, until a different rule is laid down by a court of superior jurisdiction. • • • Such a rule is essential to an orderly and seemly administration of justice in a court composed of several judges."

However, it appears that this doctrine has been modified to some extent in *Dictograph Products Company v. Sonotone Corporation*, (2 Cir. 1956) 230 F. 2d 131, dismissed per stipulation 352 U.S. 883 (1956). (see also *Higgins v. California Prune & Apricot Grower*, (2 Cir. 1924) 3 F. 2d 896, 898; *First National Bank in Greenwich v. National Airlines, Inc.*, (2 Cir. April 6, 1961) F. 2d). However, what was involved in these latter cases was either a non-appealable order or a ruling in the meantime by a higher court on the issue in question.

In the instant case the Court of Appeals, in its decision handed down on April 14, 1961, stated that—

> "Appellees' argument that this order was not final and hence unappealable under 28 U.S.C. §1291, 1292 is not well taken. No parallel state actions were pending and there was no state adjudication to await.

Opinion and Order of Judge Cashin in the United States District Court for the Southern District of New York

> There was nothing left to be done in the federal courts because the action there had been for all intents and purposes concluded. Appellant was effectively out of court—any action upon its prayer for injunctive relief was indefinitely postponed under these circumstances. There is no bar on this ground to appealability. See Glen Oaks Utilities, Inc. v. City of Houston, 280 F. 2d 330 (5 Cir. 1960)."

Although it is true that since Judge Bicks rendered his decision a higher court has spoken on the matter, that court had no jurisdiction over the subject matter and whatever it said on the matter was dictum.

Assuming, however, that I have the power to overrule Judge Bicks and Judge Dimock, I will not so exercise it. This is not a situation where plaintiff has no other remedy. Plaintiff has other courses open to it. The most obvious is to move before Judge Bicks for reargument in light of the Court of Appeals decision. (see Rule 34 of the General Rules of United States District Courts for the Southern and Eastern Districts of New York). The other remedy is a writ of mandamus. In *Stratton*, supra, the Supreme Court ruled that where a court of three judges should have been convened and was not, the remedy was a writ of mandamus vacating the order of the District Judge and directing him to convene a three-judge court. This view has been adhered to in later cases. (*Ex Parte Bransford*, 310 U.S. 354 (1940); *Ex Parte Cogdell*, 342 U.S. 163 (1951).

Instead of either of these courses, plaintiff has renewed its motion for the impaneling of a three-judge district court. Accordingly, the motion for the appointment of a three-judge court is denied.

It is so ordered.

Dated: New York, N. Y.
May 3rd, 1961.

JOHN M. CASHIN
United States District Judge

Order to Show Cause for a Stay Pending Application for Review to the Supreme Court in the United States Court of Appeals for the Second Circuit

Upon the annexed affidavit of Charles H. Tuttle, verified May 5, 1961, upon the decision of this Court dated April 14, 1961, upon the opinion and order of Honorable John M. Cashin herein, dated May 3, 1961, and upon all the papers heretofore filed and all the proceedings heretofore had herein,

And it appearing to the Court that (1) the actions heretofore threatened and taken by the defendants-appellees against the plaintiff-appellant are subject to grave doubt as to their legality under the Constitution and Laws of the United States; (2) such actions, if taken by the defendants-appellees in accordance with their threats so to do, would result in irreparable injury to the plaintiff-appellant; and (3) there are good and sufficient reasons to bring on this application by order to show cause,

LET the defendants-appellees, and each of them, show cause before this Court on the ..... day of May, 1961 why an order should not be entered

(1) Staying defendants-appellees, their officers, agents, servants, employees, attorneys and all persons acting in concert with them from enforcing or attempting to enforce against the plaintiff-appellant the provisions of the Alcoholic Beverage Control Law of the State of New York, especially Section 3(28), Section 22, Section 100(1) and (2), Section 17(7) and (10) thereof, pending the making and determination of the plaintiff-appellant's petition for certiorari in the Supreme Court of the United States to review the decision of this Court dated April 14, 1961 and the plaintiff-appellant's motion in the Supreme Court of the United States for leave to file a petition for a writ of mandamus directed to the Honorable Alexander Bicks,

Order to Show Cause for a Stay Pending Application for Review to the Supreme Court in the United States Court of Appeals for the Second Circuit

Honorable Edward J. Dimock and Honorable John M. Cashin and the United States District Court for the Southern District of New York; and

(2) Staying the defendants-appellees, their officers, agents, servants, employees, attorneys and all persons acting in concert with them from taking any action to hinder, harass or in any manner interfere with the plaintiff-appellant or the plaintiff-appellant's business pending the making and determination by the United States Supreme Court of the plaintiff-appellant's petition for a writ of certiorari and motion for leave to file a petition for a writ of mandamus as aforesaid; and it is

ORDERED that the defendants-appellees, their officers, agents, servants, employees, attorneys and all persons acting in concert with them be, and they hereby are, stayed from enforcing or attempting to enforce against the plaintiff-appellant the provisions of the Alcoholic Beverage Control Law of the State of New York as aforesaid, pending the determination of this application, and it is further

ORDERED that the defendants-appellees, their officers, agents, servants, employees, attorneys and all persons acting in concert with them be, and they hereby are, stayed from taking any action to hinder, harass, or in any manner interfere with the plaintiff-appellant pending the determination of this application; and it is further

ORDERED that personal service of this order to show cause and the papers on which it is based upon the Honorable Louis Lefkowitz, Attorney-General of the State of New York, attorney for the defendants-appellees, on or before the day of May, 1961 at M. shall constitute good and sufficient service of this order to show cause.

Dated: New York, N. Y., May , 1961.

U. S. C. J.

Endorsement on Order to Show Cause

The hearing of the within motion has been set for Monday, May 8, 1961 at 10:30 a.m., in room 1705, U. S. Court House, Foley Square, New York 7, New York. In the meanwhile, counsel for all parties will be expected to see to it that the status quo in the action is maintained.

May 5, 1961

A. Daniel Fusaro,
Clerk
by Niall F. O'Doherty, Chief Deputy Clerk.

Affidavit of Charles H. Tuttle in Support of Idlewild's Application

State of New York,
County of New York, } ss.:

CHARLES H. TUTTLE, being duly sworn, deposes and says:

I am counsel for the plaintiff-appellant, Idlewild Bon Voyage Liquor Corporation (hereafter called "Idlewild").

Nature of the Stays Sought

1. I make this application in support of Idlewild's application by order to show cause, for a stay to preserve the *status quo*, as Judge Dimock and Judge Cashin have done heretofore, and to prevent the defendants-appellees (hereafter called "the appellees") from driving Idlewild out of business with consequent irreparable injury.

2. The stay is sought pending the making and determination of (a) Idlewild's petition for certiorari in the Supreme Court of the United States to review the decision of this Court dated April 14, 1961, and (b) Idlewild's motion in the Supreme Court for leave to file a petition for a writ of mandamus directed to Judges Bicks, Dimock and Cashin and the United States District Court for the Southern District.

3. The stays here sought would restrain the appellees from enforcing or attempting to enforce the provisions of the Alcoholic Beverage Control Law of the State of New York against Idlewild and from taking any steps to hinder, harass or interfere with Idlewild or Idlewild's business,

pending the making and determination of the aforesaid petition for certiorari and motion for leave to file a petition for a writ of mandamus.

Judge Cashin's Decision Voiding Idlewild's Attempt To Proceed In Accordance With This Court's Decision.

4. This Court's recent decision of April 14, 1961 records Idlewild's seemingly interminable quest for the relief to which this Court there said Idlewild is "entitled" (p. 1445).

5. Idlewild promptly sought to comply with this Court's decision by moving in the U. S. District Court for the Southern District of New York, on an order to show cause issued on April 18, 1961 by the Honorable John M. Cashin, for the convening of a three-judge District Court and for an injunction, both preliminary and permanent.

6. Judge Cashin granted an interim stay preserving the *status quo*, substantially in the form previously granted by Judge Dimock (Appendix to Appellant's Brief 96a-97a), pending his decision on Idlewild's application.

7. On May 3, 1961, however, Judge Cashin denied Idlewild's application to convene a three-judge District Court with an opinion which is annexed as Exhibit A.

8. Judge Cashin's opinion characterizes as "dictum" the holding of this Court that (p. 1444) "a three-judge district court should have been convened" by Judge Bicks and Judge Dimock, and the express holding of this Court (p. 1443) that because they acted without jurisdiction, "we have no jurisdiction to entertain an appeal",—the precise *ratio decidendi* which caused this Court to dismiss Idlewild's appeal.

Affidavit of Charles H. Tuttle in Support of Application

9. Instead, Judge Cashin felt constrained to follow as "the law of the case" the very refusals by Judge Bicks and Judge Dimock to convene a three-judge District Court which this Court has just held were without jurisdiction, and as to which this Court explicitly said (p. 1445):

> "The results we reach are unhappy ones. We are refusing access to our court to a party who we believe is entitled to relief."

10. Judge Cashin suggested that Idlewild might move for reargument before Judge Bicks or petition the United States Supreme Court for a writ of mandamus.

11. Application to Judge Bicks for reargument is highly uncertain because (a) the ten-day interval therefor has long since expired (General Rule 9(m) of the U. S. District Court for the Southern District of New York); (b) Rule 34 cited by Judge Cashin seemingly is confined to a remand for further proceedings; and (c) unhappily Judge Bicks is in the hospital, as I am informed, for serious surgery.

12. Accordingly, the last remaining remedy for Idlewild's substantial federal rights appears to be an application to the Supreme Court of the United States for a certiorari and/or a writ of mandamus.

13. If the stay here sought is granted, I will undertake to prosecute these applications to the Supreme Court with the greatest possible vigor and dispatch. If this application should be denied, however, Idlewild's resort to the Supreme Court would be rendered moot, for in the absence of a stay, the appellees would be free to pursue their previous course designed to put Idlewild out of business forthwith.

Affidavit of Charles H. Tuttle in Support of Application

Irreparable Injury To Idlewild Will Result Unless The Stay Here Sought Is Granted.

14. At every stage of Idlewild's long, and so far fruitless, quest for a remedy to protect its substantial federal rights, it has been necessary to seek successive stays by order to show cause because the appellees have been unwilling to agree to a moratorium in their unrelenting struggle to exterminate Idlewild.

15. This action was made necessary because the appellees' determination that Idlewild's business is "illegal" had dried up Idlewild's sources of supply in New York State, and Idlewild was threatened with "the prospect of closing its doors" as Judge Bicks found (188 F. Supp. at p. 436).

16. When Idlewild sought to appeal Judge Bicks' decision, the appellees instantly retaliated and attempted to choke off Idlewild's out-of-state sources of supply, first under color of law and then by overt threats to Idlewild's truckers. For this reason, Judge Dimock granted an injunction pending Idlewild's appeal to this Court against attempts by the appellees to hinder, harass or in any manner interfere with Idlewild or its business (Appendix to Appellant's Brief 93a-94a, 96a-97a).

17. After this Court's decision of April 14, 1961, Judge Cashin continued Judge Dimock's stay in effect pending his decision, thereby again preserving the *status quo*.

18. Now, however, Judge Cashin's stay has expired. By this application Idlewild merely seeks to preserve the *status quo* pending its resort to the United States Supreme Court.

Affidavit of Charles H. Tuttle in Support of Application

19. Accordingly, unless the stay here sought is granted, Idlewild will be hounded out of business by the appellees, and its substantial federal rights will be destroyed before Idlewild has had its day in the federal court to which it is entitled by statute and by the express statement of this Court.

20. This application by order to show cause is necessary because Mr. Watson, counsel for the appellees, candidly advised my associate, Stuart H. Johnson, Jr. over the telephone yesterday that the appellees would not even consent to a brief moratorium to permit Idlewild to apply by motion for the stay here sought.

21. Except as stated above, no previous application has been made for the relief here sought.

22. Accordingly, I respectfully request that the stay here sought be granted, together with such other and further relief as may be just.

(Sworn to by Charles H. Tuttle on May 5, 1961.)

Stay Order of Court of Appeals, Dated May 8, 1961

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of May, one thousand nine hundred and sixty-one.

Present:

Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH, Circuit Judges,
Hon. HARRY E. WATKINS, District Judge.

A motion having been made herein by counsel for the appellant for a stay pending application for writ of certiorari to the Supreme Court of the United States, and for other and further relief,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is referred to the panel of this court which dismissed the appeal.

Further ordered that a stay of all proceedings shall continue until Wednesday, May 10, 1961, with leave to seek a further stay.

Stay Order of Court of Appeals, Dated May 10, 1961

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of May, one thousand nine hundred and sixty-one.

Present:

Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH, Circuit Judges,
Hon. HARRY E. WATKINS, District Judge.

A motion having been made herein by counsel for the appellant for the continuance of a stay heretofore granted by the court,

Upon consideration thereof, it is

Ordered that the stay heretofore granted on Monday, May 10, 1961, be and it hereby is extended pending disposition of the motion for a stay.

Petitioner's Notice of Alternative Application for an Order Recalling and Amending the Mandate of the Court of Appeals for the Second Circuit

Sir:

Please Take Notice that in connection with the plaintiff-appellant's pending application for a stay, the plaintiff-appellant will move in the alternative, pursuant to the request in its moving papers for such other and further relief as may be just, for an order recalling and clarifying the mandate of this Court, and amending the said mandate so as expressly to vacate the decisions and orders of Honorable Alexander Bicks and Honorable Edward J. Dimock herein for lack of jurisdiction and as nullities and/or remanding the case to the United States District Court for the Southern District of New York for further proceedings in conformity with the decision of this Court dated April 14, 1961.

Dated: New York, New York
May 9, 1961

Kelly & Schwartz
Attorneys for Plaintiff-Appellant

To:

Honorable Louis J. Lefkowitz
Attorney General of the State of New York

Injunction Order of the United States Court of Appeals for the Second Circuit, Dated May 15, 1961

INJUNCTION ORDER

WHEREAS on April 14, 1961 this Honorable Court dismissed for lack of jurisdiction a purported appeal preferred to it in the within cause; and WHEREAS by application presented to this Court on May 8, 1961 appellant is desirous of having this decision reviewed by the Supreme Court of the United States and has prayed for other relief, and is desirous of having the parties left in the same position that they were in at the time the appeal was taken until a reasonable time has elapsed within which the petition for mandamus and/or certiorari may be prepared and filed,

NOW, THEREFORE, IT IS HEREBY ORDERED That for a period of thirty days from the day of this order, and for no longer time, the defendants-appellees, their officers, agents, servants, employees, attorneys and all persons acting in concert with them, are enjoined from enforcing or attempting to enforce against the plaintiff-appellant the provisions of the Alcoholic Beverage Control Law of the State of New York, especially Section 3(28), Section 22, Section 100(1) and (2), Section 17(7) and (10) thereof, pending the making and filing of the plaintiff-appellant's petition for mandamus and or certiorari in the Supreme Court of the United States to review the decision of this Court dated April 14, 1961; and

The defendants-appellees, their officers, agents, servants, employees, attorneys and all persons acting in concert with them, are further enjoined for said thirty days from taking any action, to hinder, harass or in any manner interfere with the plaintiff-appellant or the plaintiff-appellant's business pending the making and filing in the United States Supreme Court of the plaintiff-appellant's petition for a writ of mandamus and/or certiorari.

And in all other respects plaintiff-appellant's prayers for relief are denied.

J. EDWARD LUMBARD
STERRY R. WATERMAN
U. S. C. JJ.
J. WARREN MADDEN
Judge, U. S. Court of Claim

May 15, 1961

Federal Statutes and Regulations

(a) 28 U.S.C. §2281 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

(b) 28 U.S.C. §2284 provides in pertinent part:

"In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

• • •

"(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent

irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted."

(c) 28 U.S.C. §1337 provides in pertinent part:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce * * *."

(d) 28 U.S.C. §1331(a) provides:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

(e) 28 U.S.C. §1291 provides in pertinent part:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * *. * * * except where a direct review may be had in the Supreme Court."

(f) 28 U.S.C. §1292(a) provides in pertinent part:

"(a) The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, * * * refusing * * * injunctions, * * * except where a direct review may be had in the Supreme Court."

[fol. 148] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 149]

SUPREME COURT OF THE UNITED STATES

No. 138—October Term, 1961

IDLEWILD BON VOYAGE LIQUOR CORPORATION, Petitioner,

vs.

THOMAS E. ROHAN ET AL.

ORDER ALLOWING CERTIORARI—October 9, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is consolidated with No. 180, Misc. and a total of two hours is allowed for oral argument. The cases are set for argument immediately following Nos. 90 and 91.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 150]

SUPREME COURT OF THE UNITED STATES

No. 180 Misc.—October Term, 1961

IDLEWILD BON VOYAGE LIQUOR CORPORATION, Petitioner,

vs.

HONORABLE ALEXANDER BICKS ET AL., JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

ORDER GRANTING MOTION FOR LEAVE TO FILE A PETITION FOR WRIT OF MANDAMUS—October 9, 1961

On Consideration of the motion for leave to file a petition for writ of mandamus herein,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted. The case is consolidated with No. 138 and a total of two hours is allowed for oral argument. The cases are set for argument immediately following Nos. 90 and 91.

[fol. 151]

SUPREME COURT OF THE UNITED STATES

No. 138—October Term, 1961

IDLEWILD BON VOYAGE LIQUOR CORPORATION, Petitioner,

vs.

THOMAS E. ROHAN ET AL.

ORDER OF SUBSTITUTION—January 8, 1962

On Consideration of the motion to substitute Robert E. Doyle, John C. Hart, and Benjamin H. Balcom in the place of Grant F. Daniels, Thomas E. Rohan, and Samuel H. Birnbaum as parties respondent,

It Is Ordered by this Court that the said motion be, and it is hereby, granted.

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SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
JUN 7 1961
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1960

No. [redacted] 138

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,
Respondents.

PETITION FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 1220 MISC.

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

HONORABLE ALEXANDER BICKS, HONORABLE EDWARD J. DIMOCK, HONORABLE JOHN M. CASHIN, JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondents.

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

PETITIONER'S APPENDIX

CHARLES H. TUTTLE,
Counsel and Attorney for Petitioner,
15 Broad Street,
New York 5, New York.

207 BAR PRESS, INC., 84 LAFAYETTE STREET, NEW YORK 13, N. Y. — WA 9-3422

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APPENDIX

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civil 2902

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

Plaintiff.

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Defendants.

Plaintiff, for its complaint herein, alleges:

1. This action arises under Article I, Section 8, Clause 3 (interstate and foreign commerce clause) and Article I, Section 10, Clause 2 (import, export clause) of the Constitution of the United States, and under Section 311 of the Tariff Act of 1930 [19 U. S. C. §1311], and Sections 5521 and 5522 of Title 26 U. S. C., the Internal Revenue Code, as hereinafter more fully appears. This action is for an injunction pursuant to the provisions of Sections 2281 and 2284 of Title 28 U. S. C. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

2. At all times hereinafter mentioned plaintiff was and still is a corporation duly organized and existing under the laws of the State of New York, having its principal place of business at Arrivals Building, New York International Airport, Jamaica, Queens County, New York.

3. The defendant Thomas E. Rohan is the Chairman of the State Liquor Authority, an administrative agency of the State of New York created under Article 2 of the Alcoholic Beverage Control Law of the State of New York, and resides at 158-18 Riverside Drive West, in the Borough of Manhattan, City, County and State of New York, within the Southern District of New York, and has an office for the transaction of business of the Authority at 270 Broadway, in the Borough of Manhattan, City, County and State of New York, within said District. The defendants Martin C. Epstein, William H. Morgan, Grant F. Daniels and Samuel M. Birnbaum are members and commissioners of the said State Liquor Authority.

4. Plaintiff's operations hereinafter described are conducted in the Arrivals Building at New York International Airport at Idlewild in the Borough of Queens, City and State of New York, under an Agreement of Lease dated October 31, 1956, made to it, as lessee, by The Port of New York Authority, as lessor. The lease provides that the premises may be used by the plaintiff, and they are so used, solely for an office in connection with the sale for export to foreign countries by the plaintiff of in-bond wines and liquors.

Plaintiff is using, and is required to use, such premises solely for an office in connection with the receipt of paid orders for export by the plaintiff of United States Customs bonded wines and liquors, which are free of United States and New York State taxes, to foreign countries only and

not for use in the State of New York, or in any other State, Territory or Possession of the United States.

The leased premises have been approved by and are in the custody and under the supervision and control of the United States Bureau of Customs both as regards the initial construction and security of the space and as regards its constant and continuing supervision and the accountability of plaintiff for all wines and liquors exported under Customs Regulations adopted pursuant to the authority of the Tariff Act of 1930 as amended. Such wines and liquors are at all times in the custody of the Bureau and are kept under lock and key in these premises and are entered in and withdrawn from these premises on Bureau of Customs documents and forms and under its supervision and control.

The bonded wines and liquors exported by plaintiff are purchased for such purpose by plaintiff solely from various suppliers while in bond and withdrawn for export only by plaintiff exclusively from Class 6 United States Government bonded manufacturing and United States Customs bonded warehouses, where they are located, for rewarehousing at the United States Customs controlled space of the plaintiff in such leased premises under such Customs Regulations. Plaintiff is required to keep, and does keep, full records and receipts on United States Customs approved forms governed by such Regulations for the disposition of each and every bottle withdrawn.

Each bottle is required by Section 5301 of the Internal Revenue Code and by the provisions of Regulations 26, Code of Federal Regulations, Part 201, Section 201.467, adopted thereunder and to which reference is hereby made, to be labeled with an export label "Bottled for export from the U. S. A.", the use of which label for domestic purposes or purposes other than export is rendered illegal by applicable federal laws and regulations.

The bonded, tax-free wines and liquors manufactured and stored exclusively in such bonded warehouses, purchased from the suppliers for export only and sold by the plaintiff from its leased premises for export solely, remain at all times in the constant and continuous custody, control and supervision of the United States Treasury Department, Bureau of Customs, under Regulations adopted pursuant to Section 311 of the United States Tariff Act of 1930 [19 U. S. C. §1311], as amended, which are designed to, and do, insure against the diversion of the wines and liquors for use in the State of New York or elsewhere in the United States and which continuously insure the export thereof to foreign countries. The elaborate and exhaustive precautionary measures contained in the Regulations which provide such continuous custody and supervision of the wines and liquors and of plaintiff's operations by the United States Customs Bureau and its officials (a) while in such bonded warehouses, (b) during transshipment therefrom to the premises leased by plaintiff, (c) while in said premises, and (d) during transportation to and loading on the carrier and down to the moment of departure, are contained in the Code of Federal Regulations, Title 19, ch. 1, Parts 18 and 19, and in Regulations adopted pursuant to the applicable provisions of the Internal Revenue Code above referred to, reference to which is hereby made.

None of the wines and liquors sold by the plaintiff have been or can be diverted to use in the State of New York or elsewhere in the country. Class 6 bonded warehouses and United States Customs bonded warehouses are designed exclusively for the storage in bond of wines and liquors, tax free, solely for exportation and are the only classes of warehouses in which these articles, once they have been placed therein, are irrevocably destined for export and from which they cannot ever be legally withdrawn for domestic use or sale or enter domestic commerce even

upon tender of taxes and duties, and such Tariff Act and Regulations have been so construed by the Treasury Department, Bureau of Customs, the Federal agency charged with their administration and enforcement. Such products constitute exports from the moment they are placed in such warehouses.

Orders for the purchase of such wines and liquors are received by plaintiff, and paid for at plaintiff's office in the leased premises, from passengers exclusively for export to such passengers departing solely by non-stop planes from the Airport to foreign countries only. The wines and liquors so exported are delivered by plaintiff pursuant to said Customs Regulations under Customs supervision to the airlines only, and not to the purchasers or passengers, on approved documents for foreign export with delivery to the passengers to be made only at the foreign destination of the passengers subject, as aforesaid, to the continuing supervision and control, under said Regulations, of the Bureau of Customs, which certifies that the goods were laden for export.

The operations of the plaintiff are intended and employed for the benefit primarily of Economy Fare passengers of moderate means who constitute the majority of the pasengers departing from the New York International Airport at Idlewild. Plaintiff's average sales consist of one bottle per passenger since most European countries by law permit only one such bottle to be so imported duty-free. Thus a passenger going abroad who normally would pay approximately $7 for a bottle of liquor in most sections of Europe is enabled by plaintiff's operations to have exported and delivered to him abroad a single bottle purchased from plaintiff at a cost of approximately $3.

Such privilege afforded by plaintiff's operations to international travelers (a) encourages foreign travel by nationals of the United States and of all foreign countries

since it is a privilege reciprocal to that granted in foreign countries to passengers bound for the United States who are permitted to purchase a limited quantity of liquor abroad and to import such liquor into the United States free of United States duties and United States and New York taxes, and (b) opens new markets for the export of American liquors and thus assists in stimulating foreign trade therein in accordance with the statutory Congressional economic policy hereinafter set forth.

5. The entire plan of plaintiff's operations and procedures as set forth above in paragraph 4 of this complaint has been approved by the United States Bureau of Customs.

6. The United States Treasury Department, Bureau of Customs, has ruled that these transactions constitute exports to foreign countries of such bonded, tax-free wines and liquors within the meaning of Section 311 of the United States Tariff Act of 1930 as amended [19 U. S. C. §1311]. A copy of that ruling and section is annexed hereto as Exhibit A. The United States Treasury Department, Bureau of Customs, has accordingly declared, pursuant to the authority vested in it by law and regulations, that such transactions constitute exports and are exempted by law from all Federal excise taxes and duties on the wines and liquors exported.

7. Defendants, acting upon an opinion of the Attorney General of the State of New York, dated June 30, 1960 (a copy of which is annexed hereto as Exhibit B), have advised plaintiff that they have determined that plaintiff's operations set forth above in paragraph 4 of this complaint are illegal as in violation of Section 3, subdivision 28, Section 62, and Section 100, subdivisions 1 and 2, of the

Alcoholic Beverage Control Law of the State of New York, because the transactions between plaintiff and its suppliers and plaintiff and the purchasers of said bonded, tax-free wines and liquors constitute sales within the State of New York which cannot be made without obtaining appropriate license. The defendants concede, and it is a fact, that the Alcoholic Beverage Control Law makes no provision for licensing operations such as those carried on by the plaintiff. A copy of a letter embodying such determination, dated July 11, 1960, is annexed hereto as Exhibit C. It is further a fact, and the New York State Department of Taxation has ruled, that under the Tax Law of the State of New York, Section 424(f), the State of New York is without power to tax plaintiff's transactions in these tax-free wines and liquors. A copy of the applicable provisions of said section and of such ruling, dated August 2, 1954, is annexed hereto as Exhibit D.

8. Defendants have further determined, and have advised plaintiff of such determination, that Section 3, subdivision 28, Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York (copies of which are annexed as Exhibit E), prohibit and make unlawful and a crime plaintiff's operations aforesaid, including both plaintiff's purchases for export from its suppliers and plaintiff's sales for export. Defendants have further threatened to enforce, and will, unless restrained by this Court, enforce, or endeavor to enforce such determination by restraining or endeavoring to restrain and prohibit plaintiff's operations and by subjecting plaintiff to civil and criminal proceedings to enforce and carry out their determination, all to the great and irreparable damage of the plaintiff.

9. As a result of defendants' acts as aforesaid, the New York Importers and Distillers Association, Inc. has already circularized its many members, consisting of the largest distillers and exporters of bonded liquor in this country, including those from which plaintiff purchases bonded, tax-free wines and liquors for export to foreign countries, advising such members not to fill plaintiff's orders or to sell to the plaintiff bonded, tax-free wines and liquors for such export because of the defendants' determination that plaintiff's operations are in violation of the above-mentioned sections of the Alcoholic Beverage Control Law of the State of New York and that such sales to the plaintiff are not within the scope of wholesalers' licenses under Section 62 of such law.

10. As a result of defendants' acts as aforesaid, plaintiff will, unless defendants are enjoined by this Court, suffer the loss and forfeiture of its valuable lease which is conditioned on the continuance of plaintiff's operations, or the loss of the right of possession thereunder, while remaining liable for the rental under such lease, and will further sustain great and irreparable injury and damage in that it will be compelled to cease its operations, and its business, valued well in excess of $1,000,000, will be destroyed and the plaintiff and its officers will be subjected to fines or criminal penalties pursuant to Section 130 of the Alcoholic Beverage Control Law.

11. Section 3, subdivision 28, Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, in so far as they require plaintiff to obtain a license to carry on the operations set forth in paragraph 4 of this complaint or prohibit or render such operations unlawful or criminal are unconstitutional

and void as repugnant to the provisions of Article I, Section 8, Clause 3 and Article I, Section 10, Clause 2 of the Constitution of the United States for the following reasons, among others:

(a) The Tariff Act of 1930, as amended and the Regulations adopted thereunder, taken in conjunction with the provisions of the applicable Internal Revenue Code, including Title 26 U. S. C., Sections 5521 and 5522, together constitute, and have been construed by the Supreme Court and the courts of the State of New York to constitute, a comprehensive, exclusive and preemptive scheme duly adopted by Congress for the regulation, encouragement and promotion of foreign commerce in, and exports of, bonded wines and liquors, which are thereby and for that purpose exempted from all taxes and duties, including State taxes, under the powers vested exclusively in Congress under the Commerce Clause of the Federal Constitution, Article I, Section 8, Clause 3, and under Article I, Section 10, Clause 2 thereof, which commands that no state shall without consent of Congress lay any imposts or duties on imports or exports, and under Article VI, Clause 2 thereof making the "Constitution and laws of the United States which shall be made in pursuance thereof * * * the supreme law of the land."

Plaintiff's operations fall directly within the scope and purpose of this Congressional economic statutory policy for the development, by means of such tax exemption, of foreign markets for American liquors by enabling them to compete abroad with similar foreign products.

(b) These Regulations and the continuous custody, supervision and control of plaintiff's opera-

tions by the United States Treasury Department, Bureau of Customs, insure that the bonded, tax-free wines and liquors are irrevocably destined for export to foreign countries only and cannot ever be, and are not, diverted to use in the State of New York or elsewhere in the United States, and cannot and do not enter domestic commerce.

(c) Under plaintiff's operations governed by these Regulations of the Treasury Department, Bureau of Customs, as aforesaid, there is an assured continuous and uninterrupted movement of such bonded, tax-free wines and liquors in foreign commerce for export to foreign countries. Upon delivery thereof to the airlines in non-stop transoceanic aircraft such liquors and wines cannot be relanded in the United States or otherwise enter domestic commerce. Such bonded, tax-free wines and liquors are in the actual possession and custody of the United States Government, never have become and never can become a part of the mass of property within the State of New York, and are not legally within the State. The State of New York never has acquired and never can acquire jurisdiction thereof for the purpose of prohibiting their purchase and sale for export and their export and transportation in foreign commerce or of requiring license therefor, or rendering the same unlawful and subject to civil and criminal sanctions. Since the State of New York has no power under the Federal Constitution to tax exports thereof to foreign countries, *a fortiori* it has no power to prohibit them or to render them illegal and criminal, nor any power to prohibit and obstruct foreign commerce therein.

(d) Neither are any of the above powers conferred on the State of New York by the Twenty-First Amendment to the Federal Constitution which provides that "the transportation or importation into any State, Territory or Possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited" for the reasons, among others, that there has been and can be under plaintiff's said operations no transportation or importation of plaintiff's bonded, tax-free wines and liquors for delivery or use in the State of New York, nor would that State possess, by virtue of such Amendment, the power to prohibit altogether such importation even if such an importation had taken place. Further, Congress by the adoption of the Tariff Act of 1930 and the applicable provisions of the Internal Revenue Code and applicable regulations thereunder, has fully preempted the whole field of such liquor exports, and purchases and sales for export, and their custody, regulation, control and supervision under the Commerce Clause of the Federal Constitution, and any attempt by the State of New York to license, regulate or prohibit plaintiff's transactions in such wines and liquors is in direct conflict with such Federal regulation.

12. The acts of the defendants create an existing dispute between the parties as to plaintiff's present legal rights amounting to a justiciable controversy which plaintiff is entitled to have determined in this action on the merits by a three-judge court under 28 U. S. C., Section 2281, which plaintiff requests be impaneled for the determination of this controversy.

13. Plaintiff is entitled to maintain this action and to obtain the relief therein requested from this Court, and cannot be required to have recourse for such relief to the Courts of the State of New York, even assuming, contrary to the facts, that the latter have jurisdiction to grant such relief and that the State statutes afford plaintiff an adequate remedy in such Courts, for the following reasons:

The Federal rights for which plaintiff asks the protection of this Court in this action are based solely upon the provisions of the Federal Constitution and on the comprehensive, exclusive and preemptive Federal statutory scheme outlined above (with which the State statute and the defendants' acts here are in direct conflict) for the encouragement, protection and regulation of foreign trade in, and export of, tax-free bonded wines and liquors and upon specific paramount considerations of Federal (not State) policy which can only be adequately, properly and fully determined and protected by a Federal Court.

Denial of plaintiff's right of access to this Court would deprive plaintiff of its right to a prompt and expeditious determination of the Federal issues involved. Such denial would subject the plaintiff to the added unnecessary delay and expense of a costly, protracted and futile litigation through all the courts of the State, only to be finally resolved in the end by a decision of the United States Supreme Court.

14. Plaintiff has in fact and in law neither any administrative remedy under the Alcoholic Beverage Control Law of the State of New York nor any adequate remedy in its Courts because Section 121 of that Act (a copy of which is annexed as Exhibit F) not only excludes the defendants' acts above set forth from review by its Courts, but in all cases where any such review is allowed confines the granting of any stay pending such review to a period not exceeding thirty days.

15. Plaintiff has no plain, adequate or complete remedy at law.

WHEREFORE, complainant prays:

A. That this Court hold and adjudge that as applied to the plaintiff, Section 3, subdivision 28, and Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, and all other provisions of said Law which defendants might claim would affect plaintiff's operations, are unconstitutional and void as being contrary to Article I, Section 8, Clause 3 of the Constitution of the United States, which provides that Congress shall have the power to regulate commerce with foreign nations.

B. That this Court hold and adjudge that as applied to the plaintiff, Section 3, subdivision 28, and Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, and all other provisions of said law which defendants might claim would affect plaintiff's operations, are unconstitutional and void as being contrary to Article I, Section 10, Clause 2 of the Constitution of the United States which prohibits a state, without the consent of Congress, from laying any imposts or duties on imports or exports, and as being in violation of Section 311 of the Tariff Act of 1930 [19 U. S. C. §1311] and of the provisions of the applicable Internal Revenue Code.

C. That this Court issue an injunction, both preliminary and permanent, enjoining the defendants, and each of them, from enforcing or attempting to enforce against the plaintiff and from putting or attempting to put into execution as against it Section 3, subdivision 28, and Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, and all other provisions of said Law which the defendants might claim would affect plaintiff's operations, either by

invoking or attempting to invoke its civil or criminal sanctions or otherwise.

D. That complainant have such other and further relief in the premises as may be just and proper.

KELLY AND SCHWARTZ
By JOHN F. KELLY
Member of Firm
Office and P. O. Address:
1780 Broadway
New York 19, New York

State of New York, }
County of New York, } ss.:

ARTHUR GILIOTTI, being duly sworn, deposes and says: That he is the President of Idlewild Bon Voyage Liquor Corporation, the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

ARTHUR GILIOTTI

Sworn to before me this
22nd day of July, 1960.

DONALD L. PRICE
Notary Public, State of New York
No. 24-8439300
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1962

Exhibit A Annexed to Complaint

(Ruling of Treasury Department, Bureau of Customs, and Section 311 of Tariff Act of 1930 [19 U. S. C. §1311])

[LETTERHEAD OF]

TREASURY DEPARTMENT
BUREAU OF CUSTOMS
Washington 25

In reply refer to
DB 235
Your file:
FBL:VW:19.15

Dear Mr. Dill:

We refer to your letter of March 10, 1958, concerning the proposal of the Idlewild Bon Voyage Liquor Corporation for the withdrawal of liquor from class 6 bonded manufacturing warehouses for rewarehousing in the company's locker at Idlewild Airport and subsequent sale to foreign-bound airline passengers, free of duty and tax. You state that under the proposed procedure final delivery of the liquor will be made by flight personnel of the plane after departure from the United States.

In a letter dated December 27, 1957, to John F. Kelly, attorney for the Idlewild Bon Voyage Liquor Corporation, the proposal of the applicant was rejected under the theory that delivery of the liquor to the passengers in flight did not meet the requirements of section 311, Tariff Act of 1930, as amended. A copy of this letter was furnished to your office.

Exhibit A Annexed to Complaint

The applicant has now modified its proposal to the extent that the liquor will be delivered to the airline on approved documents for export with delivery to the passenger to be made only at the foreign destination of the passenger.

We believe that delivery of the liquor to the passenger after he has reached his port of debarkation would be an exportation of the merchandise within the meaning of section 311 of the tariff act. Therefore, with the distinct understanding that the liquor will be so delivered, the procedure proposed by the applicant is approved.

Very truly yours,

(Signed) D. B. STRUBINGER
Acting Commissioner of Customs

Hon. Robert W. Dill
Collector of Customs
New York 4, New York

Exhibit A Annexed to Complaint

§1311. Bonded manufacturing warehouses.

All articles manufactured in whole or in part of imported materials, or of materials subject to internal-revenue tax, and intended for exportation without being charged with duty, and without having an internal-revenue stamp affixed thereto, shall, under such regulations as the Secretary of the Treasury may prescribe, in order to be so manufactured and exported, be made and manufactured in bonded warehouses similar to those known and designated in Treasury Regulations as bonded warehouses, class six: *Provided*, That the manufacturer of such articles shall first give satisfactory bonds for the faithful observance of all the provisions of law and of such regulations as shall be prescribed by the Secretary of the Treasury: *Provided further*, That the manufacture of distilled spirits from grain, starch, molasses, or sugar, including all dilutions or mixtures of them or either of them, shall not be permitted in such manufacturing warehouses.

Whenever goods manufactured in any bonded warehouse established under the provisions of the preceding paragraph shall be exported directly therefrom or shall be duly laden for transportation and immediate exportation under the supervision of the proper officer who shall be duly designated for that purpose, such goods shall be exempt from duty and from the requirements relating to revenue stamps.

No flour, manufactured in a bonded manufacturing warehouse from wheat imported after ninety days after June 17, 1930, shall be withdrawn from such warehouse for exportation without payment of a duty on such imported wheat equal to any reduction in duty which by treaty will apply in respect of such flour in the country to which it is to be exported.

Exhibit A Annexed to Complaint

Any materials used in the manufacture of such goods, and any packages, coverings, vessels, brands, and labels used in putting up the same may, under the regulations of the Secretary of the Treasury, be conveyed without the payment of revenue tax or duty into any bonded manufacturing warehouse, and imported goods may, under the aforesaid regulations, be transferred without the exaction of duty from any bonded warehouse into any bonded manufacturing warehouse; but this privilege shall not be held to apply to implements, machinery, or apparatus to be used in the construction or repair of any bonded manufacturing warehouse or for the prosecution of the business carried on therein.

Articles or materials received into such bonded manufacturing warehouse or articles manufactured therefrom may be withdrawn or removed therefrom for direct shipment and exportation or for transportation and immediate exportation in bond to foreign countries or to the Philippine Islands under the supervision of the officer duly designated therefor by the collector of the port, who shall certify to such shipment and exportation, or ladening for transportation, as the case may be, describing the articles by their mark or otherwise, the quantity, the date of exportation, and the name of the vessel: *Provided*, That the by-products incident to the processes of manufacture, including waste derived from cleaning rice in bonded warehouses under the Act of March 24, 1874, in said bonded warehouses may be withdrawn for domestic consumption on the payment of duty equal to the duty which would be assessed and collected by law if such waste or by-products were imported from a foreign country: *Provided*, That all waste material may be destroyed under Government supervision. All labor performed and services rendered under these provisions shall be under the supervision of a duly designated officer of the customs and at the expense of the manufacturer.

Exhibit A Annexed to Complaint

A careful account shall be kept by the collector of all merchandise delivered by him to any bonded manufacturing warehouse, and a sworn monthly return, verified by the customs officers in charge, shall be made by the manufacturer containing a detailed statement of all imported merchandise used by him in the manufacture of exported articles.

Before commencing business the proprietor of any manufacturing warehouse shall file with the Secretary of the Treasury a list of all the articles intended to be manufactured in such warehouse, and state the formula of manufacture and the names and quantities of the ingredients to be used therein.

Articles manufactured under these provisions may be withdrawn under such regulations as the Secretary of the Treasury may prescribe for transportation and delivery into any bonded warehouse at an exterior port for the sole purpose of immediate export therefrom: *Provided*, That cigars manufactured in whole of tobacco imported from any one country, made and manufactured in such bonded manufacturing warehouses, may be withdrawn for home consumption upon the payment of the duties on such tobacco in its condition as imported under such regulations as the Secretary of the Treasury may prescribe, and the payment of the internal-revenue tax accruing on such cigars in their condition as withdrawn, and the boxes or packages containing such cigars shall be stamped to indicate their character, origin of tobacco from which made, and place of manufacture.

The provisions of section 1351 of Title 26 shall, so far as may be practicable, apply to any bonded manufacturing warehouse established under this chapter and to the merchandise conveyed therein.

Exhibit A Annexed to Complaint

Distilled spirits and wines which are rectified in bonded manufacturing warehouses, class six, and distilled spirits which are reduced in proof and bottled in such warehouses, shall be deemed to have been manufactured within the meaning of this section, and may be withdrawn as hereinbefore provided, and likewise for shipment in bond to Puerto Rico, subject to the provisions of this section, and under such regulations as the Secretary of the Treasury may prescribe, there to be withdrawn for consumption or be rewarehoused and subsequently withdrawn for consumption: *Provided*, That upon withdrawal in Puerto Rico for consumption, the duties imposed by the customs laws of the United States shall be collected on all imported merchandise (in its condition as imported) and imported containers used in the manufacture and putting up of such spirits and wines in such warehouses: *Provided further*, That no internal-revenue tax shall be imposed on distilled spirits and wines rectified in class six warehouses if such distilled spirits and wines are exported or shipped in accordance with the provisions of this section, and that no person rectifying distilled spirits or wines in such warehouses shall be subject by reason of such rectification to the payment of special tax as a rectifier. (June 17, 1930, c. 497, Title III, §311, 46 Stat. 691; June 26, 1936, c. 830, Title IV, §404, 49 Stat. 1960.)

Exhibit B Annexed to Complaint

(Opinion of Attorney General of the State of New York, Dated June 30, 1960)

[LETTERHEAD OF]

STATE OF NEW YORK
DEPARTMENT OF LAW
Albany

Louis J. Lefkowitz
Attorney General

June 30, 1960

State Liquor Authority
270 Broadway
New York, N. Y.
Attention Hyman Amsel, Esq., Counsel

Dear Sirs:

You have by letter of April 22, 1960, supplemented by letter of May 9, 1960, requested my opinion whether the transactions you describe in your request constitute a sale under the Alcoholic Beverage Control Law, and thus require a license from the State Liquor Authority. You further ask what type of license is required, if any.

As set forth in your letter of inquiry, the facts are that Idlewild Bon Voyage Liquor Corporation is a New York corporation and lessee under lease from the New York Port Authority of space 16 feet wide and 30 feet 4 inches in depth on the second floor of the new Arrivals building at New York International Airport, Idlewild. The lessee proposes to use the front portion of the space as an office where orders for liquor will be taken for a

Exhibit B Annexed to Complaint

passenger departing by plane from the United States, and where payment will be made therefor. A portion of the leased space will be used for storage and display of the liquor (purchased by the corporation from suppliers from stock held by the suppliers in bond) and will remain under bond and under supervision of the Bureau of Customs at all times until delivery to the airplane. The liquor is to be shipped by the lessee from the United States on the plane on which the passenger departs, but is not to be delivered to the passenger until he reaches his foreign destination. Shipment is to be on documents approved for export by the Federal Government. The United States Bureau of Customs has indicated that it treats this transaction as an export within the meaning of §311 of the Tariff Act of 1930.

It is my opinion that under the present provisions of the Alcoholic Beverage Control Law, this transaction constitutes a "sale" or "selling" within the State of New York. The definitions of "sale" and "selling" under this statute are broad and appear to cover the soliciting and receiving of an order, such as is here involved, even though delivery is not made within the State. The provision is as follows (Alcoholic Beverage Control Law §3[28]):

> "'Sale' means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state."

Exhibit B Annexed to Complaint

The Alcoholic Beverage Control Law (§100[1]) further provides:

> "No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter."

Accordingly, in my opinion, the transaction involved is a sale or selling, and consequently cannot be conducted without obtaining an appropriate license.

In answer to your query as to the type of license required, seemingly the Alcoholic Beverage Control Law and the rules of the State Liquor Authority do not at present afford any license for this type of transaction.

Obviously this is not a sale for consumption on the premises. Broadly speaking, it is a sale for consumption off the premises. However, the corporation is not eligible for a license for off premises consumption. For one thing, Rule 17 of the Rules of the State Liquor Authority constitutes an order that there shall be no licenses issued within the counties of the city of New York for sale at retail of alcoholic beverages for off premises consumption. But even if the Liquor Authority were to amend this rule at this time for the purpose of licensing this particular operation, the premises physically do not meet the qualification for such a license. Such qualifications are contained in §105(2) of the Alcoholic Beverage Control Law and are as follows:

> "No premises shall be licensed to sell liquors and or wines at retail for off premises consumption, unless said premises shall be located *in a store, the entrance to which shall be from the street level and located on a public thoroughfare in premises which may be occupied, operated or conducted for*

Exhibit B Annexed to Complaint

business, trade or industry or on an arcade or subsurface thoroughfare leading to a railroad terminal." [Emphasis mine.]

The premises here do not meet the requirements of the above statutory provision which I have underscored.

I conclude that without an amendment to the Alcoholic Beverage Control Law to specifically except this type of transaction from 3(28) of the statute and or to make provision for a special permit for such transactions, the transaction you describe must be construed a "sale" or "selling" and may not be conducted in the State of New York at this time, because there is no provision for a license therefor, and no alcoholic beverages in this State can be sold without a license.

Very truly yours,

s/ Louis J. Lefkowitz
LOUIS J. LEFKOWITZ
Attorney General

Exhibit C Annexed to Complaint

(Letter of State Liquor Authority, Dated July 11, 1960)

[LETTERHEAD OF]

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
STATE LIQUOR AUTHORITY
270 Broadway
New York 7

July 11, 1960

Kelly & Schwartz, Esqs.
1780 Broadway
New York 19, New York

Re: Idlewild Bon Voyage
Liquor Corporation

Dear Sirs:

This is in reply to your letters to the State Liquor Authority with respect to the proposed operations by the above corporation at the New York International Airport (Idlewild).

The Members of the Authority have determined at their meeting held on July 7, 1960, that the operation by your client is in conflict with the Laws of the State of New York and, therefore, would be illegal.

Enclosed is a copy of the opinion of the Attorney General of the State of New York dated June 30, 1960, to whom this matter was submitted.

Very truly yours,

STATE LIQUOR AUTHORITY

Hyman Amsel
Counsel

HA:cm
Enclosure

Exhibit D Annexed to Complaint

(Letter of New York State Department of Taxation, Dated August 2, 1954 and Section 424(1)(f) of New York State Tax Law)

COPY

STATE OF NEW YORK DEPARTMENT OF TAXATION AND FINANCE
Albany 1, N. Y.

August 2, 1954

TO ALL LIQUOR AND WINE DISTRIBUTORS:

There has been some confusion in the industry concerning the sales of wine and liquor to various airlines where the merchandise is delivered at airports within the State of New York. In order to overcome this confusion, this letter is being addressed so you may know that since January 1, 1954 all sales of wine and liquor to airline companies delivered within the State of New York are subject to the New York State tax except the following:

1. Sales in United States Customs Bond.
2. Sales of wine and liquors where the merchandise is stored in Class 6 Warehouse under Federal Regulations.
3. Domestic wines and liquors which will be sold to the airlines under benefit of a drawback of the Federal taxes by the distiller.

Very truly yours,

STATE TAX COMMISSION

By: John J. Purcell
Assistant Director

Exhibit D Annexed to Complaint

Section 424, subdivision 1(f) of the New York State Tax Law reads as follows:

"§424. *Taxes imposed.*—1. There are hereby levied and imposed the following excise taxes:

"(f) One dollar and fifty cents per gallon upon all other liquors, when sold or used within this state by a distributor, * * * except when sold or used under such circumstances that this state is without power to impose such tax * * *."

Exhibit E Annexed to Complaint

(Section 3, Subdivision 28, Section 62 and Section 100, Subdivisions 1 and 2, of Alcoholic Beverage Control Law of the State of New York)

Section 3, subdivision 28 of the Alcoholic Beverage Control Law provides:

"§3. *Definitions*

"Whenever used in this chapter, unless the context requires otherwise:

* * * * *

"28. 'Sale' means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state."

Section 62 of the Alcoholic Beverage Control Law provides:

"§62. *Wholesaler's liquor license*

"Any person may apply to the liquor authority for a license to sell liquor at wholesale. Such application shall be in writing and verified and shall contain such information as the liquor authority shall require. Such application shall be accompanied by a certified check, bank officers' check or draft, or money order for the amount required by this article for such license. If the liquor authority shall deny the application it shall return the fee to

the applicant, less fifteen dollars. If the liquor authority shall grant the application it shall issue a license in such form as shall be determined by its rules. Such license shall contain a description of the licensed premises and in form and in substance shall be a license to the person therein specifically designated to sell liquors at wholesale in the premises therein specifically licensed to duly licensed wholesalers, retailers and permittees in this state, and to sell liquor in bulk to a licensed rectifier or to a permittee engaged in the manufacture of products which are unfit for beverage use, for use in the manufacture of products produced and sold by such rectifier or permittee, and to sell or deliver liquor to persons outside the state pursuant to the laws of the place of such sale or delivery. Such a license shall also include the privilege to sell wine at wholesale under the same terms and conditions without the payment of any additional fee. As amended L. 1947, c. 132; L. 1951, c. 581, §3, eff. April 6, 1951."

Section 100, subdivisions 1 and 2 of the Alcoholic Beverage Control Law provides:

"§100. *Alcoholic beverages generally*

"1. No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter.

"2. No manufacturer and no wholesaler shall sell, or agree to sell or deliver in this state any alcoholic beverage for the purposes of resale to any person who is not duly licensed pursuant to this chapter to sell such beverages, at wholesale or retail, as the case may be, at the time of such agreement and sale."

Exhibit F Annexed to Complaint

(Section 121 of Alcoholic Beverage Control Law of the State of New York)

Section 121 of the Alcoholic Beverage Control Law provides:

"§121. *Review by courts*

"The following actions by the liquor authority shall be subject to review by the supreme court in the manner provided in article seventy-eight of the civil practice act or by any other appropriate remedy provided that no stay shall be granted pending the determination of the matter except on notice to the liquor authority and for a period not exceeding thirty days:

"1. Refusal by the liquor authority to issue a license or a permit.

"2. The issuance of a license or permit by the liquor authority contrary to the recommendations of a local board.

"3. The issuance of a license or permit by the liquor authority where the recommendation of a local board was not unanimous.

"4. The revocation, cancellation or suspension of a license or permit by the liquor authority.

"5. The failure or refusal by the liquor authority or a local board to render a decision within the time required by section one hundred twenty.

"6. The transfer by the liquor authority of a license or permit to any other premises, or the fail-

ure or refusal by the liquor authority to approve such a transfer.

"7. The issuance of an order of warning by the liquor authority.

"8. Refusal to approve alteration of premises. As amended L. 1952, c. 428; L. 1954, c. 350; L. 1959, c. 400, eff. April 15, 1959.

"Proceedings to review any action enumerated herein shall be entitled to a preference. As amended L. 1938, c. 329, §5; L. 1940, c. 648, eff. April 19, 1940."

Application of Plaintiff for Convening of Three-Judge Court

Plaintiff, upon its complaint heretofore filed herein, hereby makes application for hearing of this cause and of the plaintiff's motion for an injunction, both preliminary and permanent, before a three-judge district court as required by Section 2281, Title 28 of the United States Code, and requests that the Chief Judge of the United States Court of Appeals for the Second Circuit be notified pursuant to Section 2284, Title 28 of the United States Code, of the presentation of plaintiff's application for an injunction in order that the necessary designation of judges for said court may be made.

KELLY AND SCHWARTZ
Attorneys for Plaintiff
Office and P. O. Address:
1780 Broadway
New York 19, N. Y.

Order to Show Cause for Three-Judge Court and Preliminary Injunction, Dated July 22, 1960

Upon the annexed affidavit of Arthur Giliotti, verified the 22nd day of July, 1960, upon the complaint herein and the exhibits annexed thereto and upon all the proceedings heretofore had herein, and it appearing to the Court that the actions threatened to be taken by the defendants against the plaintiff are subject to grave doubt as to their legality under the Constitution and laws of the United States, and if permitted by the defendants in accordance with their threats so to do would result in irreparable injury to the plaintiff,

Let the defendants and each of them show cause before a three-judge District Court to be convened pursuant to 28 U. S. C. §2284, at Room 506, United States Court House, Foley Square, New York, New York, at 10:00 o'clock A.M. on the 26th day of July, 1960, or as soon thereafter as counsel can be heard, why an order should not be entered in accordance with the prayer of the complaint for a preliminary injunction restraining the defendants and each of them, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, from enforcing or attempting to enforce against the plaintiff and from putting or attempting to put into execution as against it Section 3, Subdivision 28, and Section 62, and Section 100, Subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, and all other provisions of said Law which the defendants might claim would affect plaintiff's operations, either by invoking or attempting to invoke its civil or criminal sanctions, or otherwise; and it is

Order to Show Cause for Three-Judge Court and Preliminary Injunction

FURTHER ORDERED, that personal service of this order and the papers upon which it is based upon the defendants and each of them on or before the 23rd day of July, 1960 at 6:00 P.M. shall constitute good and sufficient service of this order to show cause.

Dated: New York, N. Y., July 22, 1960.

THOMAS F. MURPHY
U. S. D. J.

Affidavit of Arthur Giliotti in Support of Motion for Preliminary Injunction and Temporary Restraining Order, Dated July 22, 1960

State of New York, }
County of New York, } ss.:

Arthur Giliotti, being duly sworn, deposes and says:

1. I am the president of Idlewild Bon Voyage Liquor Corporation, the plaintiff in this action.

2. This is an action for an injunction under 28 U. S. C. §§2281 and 2284 to enjoin the defendants, and each of them, from enforcing or attempting to enforce against the plaintiff and from putting or attempting to put into execution as against it Section 3, subdivision 28, Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, and all other applicable provisions of said Law which defendants might claim would affect plaintiff's operations, either by invoking or attempting to invoke its civil or criminal sanctions or otherwise. Injunction is sought on the ground that the State Law violates the provisions of the Federal Consitution and Federal statutes referred to in the complaint. All of the allegations of fact contained in the complaint herein have been read by me and are true of my own knowledge and are incorporated herein by reference thereto.

3. Plaintiff is a New York corporation which occupies, under a lease from the Port of New York Authority dated October 31, 1956, certain space in the Arrivals Building at New York International Airport at Idlewild. The entire space is 16 feet wide and 30 feet, 4 inches in depth. The front portion of the space is used by plaintiff as an office

where orders are received for the sale by plaintiff for export of bonded wines and liquors, free of United States and New York State taxes. The rear portion of the premises is used for storage of United States Customs bonded liquor for export. The entire space is under the supervision and control of the United States Bureau of Customs both as to its construction and security and as to accountability for liquor exported.

4. The bonded wines and liquors are purchased by plaintiff from various suppliers, and withdrawn by it from Class 6 Government bonded manufacturing warehouses and United States Customs bonded warehouses for rewarehousing at the Customs controlled and supervised space of the plaintiff in the Arrivals Building from where it is exported. The plaintiff keeps records and receipts on Customs-approved forms for the disposition of each and every bottle withdrawn from Government bond.

5. Orders for the purchase of the bonded, tax-free wines and liquors are received by plaintiff at its office in the Arrivals Building from passengers departing on non-stop planes for foreign countries only, and payment therefor is made at said office. The goods are not delivered by plaintiff to the passengers, but to the airlines, on approved documents for foreign export, with delivery to the passengers to be made only at their foreign destination. The Bureau of Customs certifies that the goods are laden for export.

6. The bonded, tax-free wines and liquors, from the time they are withdrawn from these bonded warehouses to the time they are loaded on the carrier, remain in the continuous custody and under the continuous supervision of the Bureau of Customs.

Affidavit of Arthur Giliotti in Support of Motion for Preliminary Injunction and Temporary Restraining Order

7. The operations of the plaintiff are intended primarily for the benefit of Economy Fare passengers who constitute the majority of passengers departing from New York International Airport at Idlewild. The average sale consists of one bottle. A passenger going abroad who normally would pay approximately $7 for a bottle of liquor in most nations in Europe is enabled to bring into those nations his single bottle purchased from plaintiff at a cost of approximately $3. Most European countries limit to one bottle the amount of tax-free liquor a traveler may bring into the country.

8. The privilege of purchase thus afforded to passengers departing for foreign countries is a reciprocal privilege to that granted in such countries to passengers bound for the United States. The latter are generally permitted to purchase a limited amount of liquor free of United States duty, and free of United States and New York State tax, which they may bring into this country with them. The privilege afforded international travelers by the corporation not only tends to encourage foreign travel but the exports themselves open up a new market for American liquors. The operation of the plaintiff is a strong stimulant of foreign trade.

9. On April 15, 1958, the Treasury Department, Bureau of Customs, in a letter to the Honorable Robert W. Dill, Collector of Customs at the Port of New York, ruled that the transactions between plaintiff and passengers on foreign-bound airlines constitute exportations to the countries of destination of bonded, tax-free wines and liquors within the meaning of Section 311 of the Tariff Act of 1930, as amended, and the operations of the plaintiff in this respect were approved. (A copy of said letter is annexed to the complaint herein as Exhibit A.)

Affidavit of Arthur Giliotti in Support of Motion for Preliminary Injunction and Temporary Restraining Order

10. By letter dated July 11, 1960, the New York State Liquor Authority notified Messrs. Kelly and Schwartz, attorneys for the plaintiff corporation, that its members had determined that plaintiff's operation was "in conflict with the Laws of the State of New York and, therefore, would be illegal." This conclusion was based upon an opinion of the Attorney General of the State of New York, attached to said letter, wherein it was stated that plaintiff's operations constitute a sale or selling of liquor within the state which is illegal and that no provision is made in the Act for the licensing thereof, citing Section 3, subdivision 28, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law. (Copies of said opinion and letter are annexed to the complaint herein as Exhibits B and C.)

11. This determination of the State Liquor Authority is in direct conflict with a ruling of the Department of Taxation and Finance of the State of New York issued "To all Liquor and Wine Distributors" on August 2, 1954, which clarified confusion in the industry concerning sales of wine and liquor to airlines. It was stated that all such sales were subject to New York State tax except, so far as pertinent here, the following:

"1. Sales in United States Customs Bond.

"2. Sales of wine and liquors where the merchandise is stored in Class 6 Warehouse under Federal Regulations."

(A copy of said ruling is annexed to the complaint herein as Exhibit D.)

12. On the basis of its determination that plaintiff is violating the Alcoholic Beverage Control Law, defendants

have threatened to enforce and will enforce, unless restrained by this Court, the provisions of the said law against plaintiff to its great, immediate and irreparable damage, by restraining or endeavoring to restrain plaintiff in the conduct of its business, by prohibiting or endeavoring to prohibit completely the operations of the plaintiff, and by subjecting plaintiff to civil and criminal proceedings for the alleged violation of the said provisions of the law.

13. One accomplished result of the defendants' acts, to the injury of the plaintiff, has been a circularization of its members by the New York Importers and Distillers Association, Inc., including members who supply plaintiff with bonded, tax-free wines and liquors for export, advising them not to fill plaintiff's orders and not to otherwise sell such goods to plaintiff because of defendants' determination that plaintiff is violating the Alcoholic Beverage Control Law.

14. Unless the threatened acts of defendants are enjoined, plaintiff will sustain the loss and forfeiture of its valuable lease with the Port of New York Authority because the life of the lease is conditioned upon the continuance of plaintiff's operations.

15. Unless defendants' threatened acts are enjoined, plaintiff will be forced to close down and discontinue its operations, as a consequence of which plaintiff's business, valued in excess of $1,000,000, will be completely destroyed.

16. Unless defendants' threatened acts are enjoined, plaintiff will be forced to file a petition in bankruptcy by reason of the fact that the sales of bonded, tax-free wines

and liquors for export constitute the sole business of the plaintiff.

17. Unless defendants' threatened acts are enjoined, the plaintiff and its officers are liable to be subjected to fines or criminal penalties provided for by Section 130 of the Alcoholic Beverage Control Law by reason of defendants' claim that plaintiff is violating the provisions of that law.

18. I am advised by counsel that the plaintiff has neither any administrative remedy under the Alcoholic Beverage Control Law nor any adequate remedy in the courts of the State of New York for the reason that Section 121 of said law expressly limits a stay pending review to a period of not to exceed thirty days. (A copy of Section 121 is annexed to the complaint as Exhibit F.) Such a limited stay would work to the irreparable injury of the plaintiff, whereas the delay occasioned by a preliminary injunction granted by this court would in no way injure the defendants because the bonded wines and liquors in the warehouse on plaintiff's premises, and in the custody and under the supervision of the Customs Bureau, cannot under any circumstances be removed from said warehouse and diverted to use within the State of New York or within the United States for consumption or otherwise. Therefore, there is no question of plaintiff's operations interfering with the policy of the Alcoholic Beverage Control Law, stated in Section 2 thereof to be the promotion and fostering of temperance in the consumption of alcoholic beverages, nor do plaintiff's operations come into collision with the reason for the law, namely "the protection, health, welfare and safety of the people of the state."

19. The whole matter of the nature and character of plaintiff's operations as hereinbefore described and the

basis of their exemption from state regulations and control have been fully presented to the defendants, and plaintiff's position has been documented in correspondence with the defendants, despite which they persist in their threats to enforce their determination that plaintiff is violating the Alcoholic Beverage Control Law and to restrain or endeavor to restrain and prohibit plaintiff's operations and the continuance of its business.

20. No previous application has been made for the relief herein requested.

WHEREFORE, plaintiff prays (1) that a preliminary injunction issue enjoining the defendants, and each of them, from enforcing or attempting to enforce against plaintiff and from putting or attempting to put into execution as against plaintiff Section 3, subdivision 28, Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law, and all other provisions of said law which defendants might claim would affect plaintiff's operations, either by invoking or attempting to invoke its civil or criminal sanctions or otherwise, and (2) that, pending the hearing and determination of the motion for a preliminary injunction, a temporary restraining order issue restraining the defendants, and each of them, as aforesaid.

ARTHUR GILIOTTI

Sworn to before me this
22nd day of July, 1960.

DONALD L. PRICE
Notary Public, State of New York
No. 24-8439300
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1962

Notice of Motion of Defendants to Dismiss Complaint, Dated July 25, 1960

SIRS:

PLEASE TAKE NOTICE that the undersigned will move this Court, at a stated term for motions to be held in Room 506 of the United States Court House, Foley Square, City of New York, on the 26th day of July, 1960, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order pursuant to Rule 12 of the Federal Rules of Civil Procedure, dismissing the complaint on the grounds that it fails to state a claim against the defendants upon which relief can be granted because:

(1) It presents no actual controversy;

(2) It fails to state a cause of action;

(3) It fails to present any real or substantial Federal question;

(4) The state courts afford a plain, speedy and efficient remedy by suit for injunction to the plaintiff and that the construction of the State Statutes should first be determined by the State Courts; and

(5) Alcoholic Beverage Control Law §3, subd. 28, §62 and §100, subds. 1 and 2, and related sections, are not unconstitutional.

The undersigned will further move, pursuant to said Rule 12, for an order dismissing the complaint on the ground that the Court lacks jurisdiction over the subject matter, because the complaint fails to show that plaintiff has been deprived of any right secured by the Constitution of the United States or by any Act of Congress

providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

PLEASE TAKE FURTHER NOTICE that the undersigned will at the same time and place move for such other, further and different relief as to the Court may seem just and proper.

Dated: New York, N. Y., July 25, 1960.

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Office & P. O. Address
80 Centre Street
New York 13, New York

To:

KELLY & SCHWARTZ, Esqs.
Attorneys for Plaintiff
1780 Broadway
New York 19, New York

Affidavit of Thomas E. Rohan in Opposition to Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order, Dated August 1, 1960

State of New York,)
County of New York,) ss.:

THOMAS E. ROHAN, being duly sworn, says that he is the Chairman of the State Liquor Authority of the State of New York and one of the defendants above-named, and that he is familiar with the facts and circumstances hereinafter set forth.

Plaintiff has brought this action allegedly under 28 U. S. C. §§2281 and 2284 to enjoin the defendants from enforcing or attempting to enforce against the plaintiff and from putting or attempting to put into execution as against it Section 3, subdivision 28, Section 62, and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, and all other applicable provisions of said law which defendants might claim would affect plaintiff's operations, either by invoking or attempting to invoke its civil or criminal sanctions or otherwise.

In connection with this action, plaintiff moves herein for an order granting to it a preliminary injunction restraining the defendants as hereinabove indicated. Simultaneously with defendants' opposition to the within motion, they will move this Court upon notice already given for an order dismissing the plaintiff's complaint upon the grounds set forth in the notice of motion.

It is respectfully submitted that this motion should be denied as a matter of law and within the sound discretion of this Court.

As early as May 6, 1958, plaintiff sought to obtain the State Liquor Authority's opinion as to the legality of its (plaintiff's) proposed operation in the sale of alcoholic beverages on premises leased by it at the New York

Affidavit of Thomas E. Rohan in Opposition to Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order

International Airport (Idlewild) located in the County of Queens, State of New York. After many conferences and study, the Authority advised the plaintiff that its proposed operation would not be legal under the provisions of the Alcoholic Beverage Control Law of the State of New York.

Thereafter, on February 19, 1959, plaintiff again submitted a proposed plan of operation with a slight modification of its original submission.

Thereafter, on May 8, 1959, after full consideration by the Members of the Authority, plaintiff was advised that its proposed operation could not be legally conducted in New York State.

On May 19, 1959, plaintiff sought reconsideration by the Authority of its former decisions. Further consideration of plaintiff's proposed business operations was denied on July 7, 1959.

Apparently plaintiff did not enter upon its proposed business. This is indicated by the letter from plaintiff's counsel to the Authority dated February 10, 1960. In this letter, plaintiff stated that "[I]nasmuch as no consent to the proposed operation has been obtained from your Authority, the space has been vacant to the present time." Also, plaintiff stated that the Port of New York Authority had advised it that unless it commenced actual operations, it would be obliged to give its consent to similar operations by another concern. Asserting that if such a situation developed, an injustice would be suffered by it, plaintiff asked for reconsideration of its original application of May 6, 1958. Plaintiff's request for reconsideration was submitted by its letter of March 24, 1960, in which it requested a ruling from the Authority that under the law set forth by the plaintiff that the proposed operations were not subject to the jurisdiction or the control of the

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New York State Liquor Authority. This request, of course, was in direct contradiction with the Authority's previous determination that plaintiff's proposed operation would constitute the sale of alcoholic beverages as defined by Section 3, subdivision 28, of the Alcoholic Beverage Control Law, and that Section 100, subdivision 1, of the Alcoholic Beverage Control Law prohibits such trafficking in alcoholic beverages without a license. It was also the Authority's determination that the Alcoholic Beverage Control Law makes no provision for a license or permit which would authorize the plaintiff to engage in the sale of alcoholic beverages in the State of New York in the particular manner outlined by it.

Under the circumstances, the Authority requested the Attorney General of the State of New York to render a formal opinion upon the legality of the plaintiff's proposed manner of trafficking in alcoholic beverages.

On June 30, 1960, the Attorney General of the State of New York rendered his opinion that the "transactions you describe must be construed a 'sale' or 'selling' and may not be conducted in the State of New York at this time, because there is no provision for a license therefor, and no alcoholic beverages in this State can be sold without a license." The complete opinion rendered by the Attorney General is annexed to the complaint as Exhibit "B" and, therefore, is not set forth in full herein.

On July 11, 1960, in reply to plaintiff's letters with respect to its proposed operation, counsel for plaintiff was advised that the Authority had determined that the operation so outlined was in conflict with the laws of the State of New York and that, therefore, it would be illegal. A copy of the opinion of the Attorney General of the State

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of New York dated June 30, 1960, hereinabove referred to, was enclosed. This action then followed. (Sometime subsequent to its letter of February 10, 1960, and in spite of the Authority's ruling as to its illegality, plaintiff evidently entered upon and commenced its operation.)

It is apparent from the foregoing that the opinion rendered by the Authority was in direct response to, and resulted from, a request made therefor by the plaintiff. Under these circumstances, it is respectfully submitted plaintiff is not entitled to and should not receive at the hands of this Court a relief in the form of a permanent or temporary injunction restraining the Authority from having responded to an inquiry made to it by the plaintiff.

It is further submitted, as will be more fully explored in the memorandum of law to be submitted herewith, that the plaintiff's remedy is to apply to the Court of the State of New York for a determination with respect to the applicability of the provisions of the Alcoholic Beverage Control Law to the operations *now* being carried on by the plaintiff.

Important in the consideration of plaintiff's operation, in the light of the provisions of the Alcoholic Beverage Control Law, it is significant to note that plaintiff purchases its liquor from suppliers who maintain such liquor in bonded warehouses known as Class 6 Warehouses (export). Upon the purchase being culminated, these suppliers cause the liquor to be delivered to the plaintiff's premises at Idlewild Airport, where plaintiff displays it and stores it. Plaintiff, of course, is not under bond, but claims that the Customs officials maintain a control over its stock. As plaintiff's purchases are made of bonded liquor, no Federal or State tax is included in the cost to it.

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Plaintiff sells its liquor either to passengers about to depart by airplane or to others on their behalf. Orders for such liquor are accepted on plaintiff's premises and payment therefor received then. It is claimed, however, that delivery of the liquor so purchased at plaintiff's premises is not made to the departing passenger until the plane lands on foreign soil. Likewise, no tax is added to the retail sales price and, consequently, the price of the liquor sold is considerably less than the price of such liquor if purchased in a licensed retail liquor store.

These facts justify the conclusion that the plaintiff's operation amounts to trafficking in alcoholic beverages in the State of New York. Such traffic now being conducted is illegal because (1) under the Alcoholic Beverage Control Law no person or corporation may engage in the traffic of alcoholic beverages in the State of New York without obtaining an appropriate license therefor, and (2) the Legislature of the State of New York has seen fit not to provide an appropriate license to cover such traffic.

It is, therefore, respectfully submitted that plaintiff is not entitled to the relief requested herein, nor to any relief, and that this motion should be denied in all respects.

/s/ Thomas E. Rohan

Sworn to before me this
1st day of August, 1960.

Madeline G. Lee
Notary Public, State of New York
No. 03-7470350
Qualified in Bronx County
Commission Expires March 30, 1962

Opinion and Order of Judge Bicks, Dated November 4, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civil 2902

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

Plaintiff,

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Defendants.

BICKS, District Judge.

Plaintiff, a New York corporation, conducts business from premises it occupies at the New York International Airport, County of Queens, pursuant to a lease by the terms of which the demised premises may be used only as an office for the receipt of orders for export of United States customs bonded wines and liquors. The defendants constitute the NEW YORK STATE LIQUOR AUTHORITY, an administrative agency created under Article 2 of the Alcoholic Beverage Control Law of the State of New York.

Wines and liquors sold by the plaintiff are not for consumption in the State of New York or in any other state, territory or possession of the United States.

The premises occupied by plaintiff have been approved by and are under the supervision of the United States Bureau of Customs. The wines and liquors sold by plaintiff are purchased solely for export from vendors who withdraw the same from Class 6 United States Government bonded manufacturing and United States Customs bonded warehouses for rewarehousing at the United States Customs-controlled space in plaintiff's leased premises. Every bottle withdrawn by plaintiff is, pursuant to the provisions of the Internal Revenue Code and applicable regulations thereunder, labeled "Bottled for export from the U. S. A." Plaintiff complies as well with §311 of the Tariff Act as amended, 19 U. S. C. A. §1311, §5301 of the Internal Revenue Code and the regulations promulgated under each of said statutes, the design and purpose whereof being to prevent diversion of any of the bonded wines and liquors to any use other than export from the United States.

Plaintiff receives orders and payment at its premises at the airport from passengers departing by non-stop planes destined for foreign countries. The merchandise is delivered to the air line with approved documents for foreign export, delivery to be made to the passenger-purchaser only upon arrival at the foreign destination. The passenger is thus enabled to export for delivery to himself upon arrival abroad, a quantity of liquor not exceeding the maximum permitted for duty free import at the point of disembarkation, at a substantial saving. The Treasury Department has expressly approved these procedures and has ruled that sales so consummated constitute an exportation of merchandise within the meaning of §311 of the Tariff Act.

Plaintiff made inquiry of the New York State Liquor Authority whether conduct of its business in the manner above set forth contravenes the New York State Alcoholic Beverage Control Law. Before replying, the State Liquor Authority asked the New York State Attorney General for an opinion. He ruled (See 1960, Op. Atty. Gen. June 30) that the business of the plaintiff constituted sales or selling within the meaning of §3(28) of the New York State Alcoholic Beverage Control Law;[1] that said law contains no provision that would authorize issuance of a license to plaintiff to conduct its business, and that under §100(1)[2] of the State Law no person is permitted to sell any alcoholic beverage within the state without a license. The New York Importers & Distillers Association circularized its members advising that in view of the position of the Attorney General and of §62 of the Alcoholic Beverage Control Law, they could not legally fill plaintiff's orders. Plaintiff has not since been able to make purchases to meet its requirements and faces the prospect of closing its doors, with consequent substantial damage.

Plaintiff urges that §3(28), §62 and §100(1) and (2) of the New York State Alcoholic Beverage Control Law,

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(1) Sec. 3(28) provides as follows:

"'Sale' means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state."

(2) Sec. 100(1) provides:

"No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter."

as sought to be applied to it are repugnant to (i) the commerce clause, (ii) the clause prohibiting a state from laying imposts or duties on imports or exports without the consent of Congress, and (iii) the supremacy clause of the constitution and therefore unconstitutional. These contentions rest on the claim that the Tariff Act of 1930 as amended, and the regulations adopted thereunder, taken together with the applicable provisions of the Internal Revenue Code, constitute a comprehensive, exclusive and preemptive scheme duly adopted by Congress for the regulation, encouragement and promotion of foreign commerce in, and export of, bonded wines and liquors.

Plaintiff seeks declaratory and injunctive relief and has moved for the impanelling of a three-judge district court pursuant to 28 U. S. C. A. §§2281, 2284.

The threshold issue is whether the federal courts should accept jurisdiction now since the issues have never been presented to or passed upon by the state courts. In a series of cases beginning with *Railroad Comm'n* v. *Pullman Co.*, 1941, 312 U. S. 496, the Supreme Court has set out the procedure for resolving constitutional issues which are reasonably open to construction. "• • • [N]o principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. See, e.g., *Railroad Comm'n* v. *Pullman Co.*, *supra*; *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168; *Spector Motor Service, Inc.* v. *McLaughlin*, 327 U. S. 582; *Shipman* v. *Du Pre*, 339 U. S. 321; *Albertson* v. *Millard*, 345 U. S. 242; *Government & Civic Employees* v. *Windsor*, 353 U. S. 364. This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy 323 U. S. 101; *American Federation of Labor* v. *Watson*,

of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication. See *Chicago* v. *Fieldcrest Dairies, Inc.*, *supra*, at 172-173." *Harrison* v. *N. A. A. C. P.*, 1959, 360 U. S. 167, 176-177. "Reflected among the concerns which have traditionally counseled a federal court to stay its hand are the desirability of avoiding unseemly conflict between two sovereignties, the unnecessary impairment of state functions, and the premature determination of constitutional questions. * * *" *Martin* v. *Creasy*, 1959, 360 U. S. 219, 224.

The controversy between Idlewild and the Liquor Authority comes to the court in precisely the tentative and hypothetical posture with which *Pullman* and its progeny are concerned. The State Attorney General rendered an opinion and acting upon that opinion the Liquor Authority advised plaintiff that its operation is "illegal". Neither the Attorney General's opinion nor the action of the Liquor Authority has been reviewed in the State Courts.

State court interpretation of state policies is especially desirable where the statute in question "provides a unified method for the formation of policy and determination of cases by the [state administrative body] * * * and by the state courts." *Burford* v. *Sun Oil Co.*, 1943, 319 U. S. 315, 333, 334.

The Alcoholic Beverage Control Law provides a comprehensive and unified scheme for the regulation and control of the sale and distribution of liquor through the State Liquor Authority. The Authority has broad discretionary powers to license the sale of liquor at wholesale and retail, to limit, revoke or suspend outstanding licenses, to specify standards of manufacture and fermentation, to hold hearings and subpoena witnesses, and to promulgate rules and regulations to promote the foregoing functions. Alcoholic Beverage Control Law, §17. *John J. King, Inc.* v. *O'Connell*, 1952, 280 App. Div. 852;

Application of Gambino, 1957, 4 A. D. 2d 37; *Berkowitz* v. *Rohan*, 1959, 193 N. Y. S. 2d 345.

In *Burford*, *supra*, where the validity of Texas oil drilling permits was attacked in the federal court, the Supreme Court, characterizing the Texas statutes under which the permits were granted as "part of the general regulatory system devised for the conservation of oil and gas", 319 U. S. at 318, indicated that "question[s] of regulation of the industry by the state administrative agency * * * so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them." 319 U. S. at 332.

"[N]o matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination * * *. In this situation, a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication." *Railroad Commission* v. *Pullman Co.*, *supra*, at 499-500. In the light of the circumstances of this case §§3(28), 62 and 100(1) and (2) may be construed by the state courts to avoid or transform the issues raised herein. See, e.g., *Durina* v. *Valente*, 267 App. Div. 383.

Martin v. *Creasy*, 1959, *supra*, teaches that irreparable injury, vel non, the District Court should not adjudicate a constitutional issue presented in a hypothetical posture. In that case, plaintiffs sought immediate relief from alleged irreparable injury as the result of the operation of Pennsylvania's limited access highway statute. Impressed by allegations of immediate irreparable harm similar to those urged by plaintiff on this motion, the District Court was persuaded that refusal to exercise jurisdiction would cause plaintiffs to "suffer substantial financial losses during the time it would take to litigate the constitutionality of the statute in the State Courts, which losses could never

be recouped if the statute were eventually declared to be unconstitutional." *Creasy* v. *Stevens*, D.C. W.D. Penna., 1958, 160 F. Supp. 404, 409, *reversed*, *Martin* v. *Creasy*, *supra*. The Supreme Court held, "[a]ssuming that there was a basis to support intervention by a court of equity, the District Court should nevertheless have declined to adjudicate this controversy." *Martin* v. *Creasy*, *supra*, at 224.

Although the substantive issues raised in the complaint may not be considered by the judge to whom application under 28 U.S.C.A. §2281 is made, he has the power to retain jurisdiction pending state court adjudication where, as here, there is insufficient basis to support intervention by a federal court of equity. *Snyder's Drug Stores* v. *Taylor*, 8th Cir., 1955, 227 F. 2d 162; *Island Steamship Lines, Inc.* v. *Glennon*, D.C. Mass., 1959, 178 F. Supp. 292, 295, 296; *Linehan* v. *Waterfront Commission of New York Harbor*, D.C. S.D.N.Y., 1953, 116 F. Supp. 401.

Motion for impanelling of a three-judge court denied, with leave to renew after the state court has ruled.

So ordered.

Dated: November 4, 1960.

—

Alexander Bicks
United States District Judge.

Notice of Appeal, Dated November 16, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civil 2902

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

Plaintiff.

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Defendants.

SIR:

PLEASE TAKE NOTICE that Idlewild Bon Voyage Liquor Corporation, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the Honorable Alexander Bicks, entered herein on November 4, 1960, refusing plaintiff's application for a temporary restraining order and a preliminary injunction, denying plaintiff's motion for the impanelling of a three-judge court, and staying further procedure in the action.

Dated: New York, New York, November 16, 1960.

Yours, etc.

KELLY & SCHWARTZ
Attorneys for Plaintiff
Office and P. O. Address:
1780 Broadway
New York 19, N. Y.

To:

HON. LOUIS J. LEFKOWITZ, Attorney General
Attorney for Defendants
Office and P. O. Address:
80 Centre Street
New York 13, N. Y.

Plaintiff's Application by Order to Show Cause to Quash Subpoena with Stay, Dated November 25, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Upon the annexed affidavit of Charles H. Tuttle, verified the 25th day of November, 1960; upon the decision and order of Honorable Alexander Bicks herein, dated and filed November 4, 1960; upon the pleadings, and upon all the proceedings heretofore had herein,

And it appearing to the Court that (1) there is grave doubt under the Constitution and Laws of the United States and the aforesaid decision and order of Judge Bicks as to the legality of a certain subpoena, dated November 22, and returnable November 29, 1960, directed to the plaintiff, and issued by the New York State Liquor Authority of which the defendants are the Chairman, Members and Commissioners, respectively; (2) the plaintiff will be irreparably injured if it is required to comply with the aforesaid subpoena on the return date thereof; and (3) there will be no opportunity to determine the validity of the aforesaid subpoena prior to its return date unless a temporary restraining order is issued,

LET the defendants and each of them show cause before this Court at Room 506, United States Courthouse, Foley Square, New York, New York, on the 29th day of November, 1960 at 10:00 A. M., or as soon thereafter as counsel can be heard why the aforesaid subpoena should not be quashed; and it is

ORDERED that the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in con-

Plaintiff's Application by Order to Show Cause to Quash Subpoena with Stay, Dated November 25, 1960

cert with them, are hereby enjoined and restrained from taking aay action pursuant to the aforesaid subpoena until the 5th day of December, 1960, or until the earlier determination of this application; and it is

FURTHER ORDERED that personal service of this order to show cause and the papers on which it is based upon the attorney for the defendants on or before the 28th day of November, 1960 at 11:00 A. M. shall constitute a sufficient service of this Order to Show Cause.

Dated: New York, N. Y.
5:45 PM November 25th, 1960.

Lloyd F. MacMahon
U. S. D. J.

Affidavit of Charles H. Tuttle in Support of Application to Quash Subpoena, Verified November 25, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

State of New York, }
County of New York, } ss.:

CHARLES H. TUTTLE, being duly sworn, says:

I am counsel for the plaintiff.

Nature of this Application

1. I make this affidavit in support of the plaintiff's application, by order to show cause, to quash the subpoena (Exhibit A, hereto) dated November 22 and returnable November 29, 1960, directed to the plaintiff, and issued by the New York State Liquor Authority of which the defendants are Chairman, Members and Commissioners.

2. The plaintiff seeks an opportunity to appeal Judge Bicks' decision refusing its application for the impanelling of a three-judge court and for a temporary restraining order and a preliminary injunction restraining the defendants from asserting jurisdiction over, and destroying thereby, the plaintiff's business in violation of the plaintiff's asserted constitutional rights.

3. The subpoena issued by the State Liquor Authority after the plaintiff's appeal was taken is a manifest attempt to thwart the decision of Judge Bicks; to render futile the plaintiff's right of appeal, and to assert an

Affidavit of Charles H. Tuttle in Support of Application to Quash Subpoena, Verified November 25, 1960

unlawful jurisdiction over the plaintiff and its business which the defendants themselves expressly disclaimed before Judge Bicks.

Nature of the Case

4. This is an action for a declaratory judgment and injunction against the Chairman, Members and Commissioners of the New York State Liquor Authority pursuant to Chapters 151 and 155 of the Judicial Code, 28 U. S. C. §§2201-2 and 2281-4, respectively.

5. The plaintiff, a New York corporation, is engaged in selling bottled liquor solely for export at premises leased from the Port of New York Authority, a bi-state agency, at New York International Airport ("Idlewild").

6. Judge Bicks, in his decision and order dated November 4, 1960 (Exhibit B, hereto) has accurately stated the nature of the plaintiff's business, as follows:

> "Wines and liquors sold by the plaintiff are not for consumption in the State of New York or in any other state, territory or possession of the United States.
>
> "The premises occupied by plaintiff have been approved by and are under the supervision of the United States Bureau of Customs. The wines and liquors sold by plaintiff are purchased solely for export from vendors who withdraw the same from Class 6 United States Government bonded manufacturing and United States Customs bonded warehouses for rewarehousing at the United States Customs-controlled space in plaintiff's leased premises. Every bottle withdrawn by plaintiff is, pursuant to

Affidavit of Charles H. Tuttle in Support of Application to Quash Subpoena, Verified November 25, 1960

the provisions of the Internal Revenue Code and applicable regulations thereunder, labeled 'Bottled for export from the U. S. A.' Plaintiff complies as well with §311 of the Tariff Act as amended, 19 U. S. C. A. §1311, §5301 of the Internal Revenue Code and the regulations promulgated under each of said statutes, the design and purpose whereof being to prevent diversion of any of the bonded wines and liquors to any use other than export from the United States.

"Plaintiff receives orders and payment at its premises at the airport from passengers departing by non-stop planes destined for foreign countries. The merchandise is delivered to the air line with approved documents for foreign export, delivery to be made to the passenger-purchaser only upon arrival at the foreign destination. The passenger is thus enabled to export for delivery to himself upon arrival abroad, a quantity of liquor not exceeding the maximum permitted for duty free import at the point of disembarkation, at a substantial saving. The Treasury Department has expressly approved these procedures and has ruled that sales so consummated constitute an exportation of merchandise within the meaning of §311 of the Tariff Act."

7. The New York State Tax Commission has also ruled that such sales are not subject to New York State tax (Complaint, Exhibit D).

8. Out of an abundance of caution, as Judge Bicks found:

"Plaintiff made inquiry of the New York State Liquor Authority whether conduct of its business

Affidavit of Charles H. Tuttle in Support of Application to Quash Subpoena, Verified November 25, 1960

> in the manner above set forth contravenes the New York State Alcoholic Beverage Control Law. Before replying, the State Liquor Authority asked the New York State Attorney General for an opinion. He ruled (See 1960, Op. Atty. Gen. June 30) that the business of the plaintiff constituted sales or selling within the meaning of §3(28) of the New York State Alcoholic Beverage Control Law; that said law contains no provision that would authorize issuance of a license to plaintiff to conduct its business, and that under §100 of the State Law no person is permitted to sell any alcoholic beverage within the state without a license."

Thereafter, the State Liquor Authority determined, and so advised the plaintiff's counsel (Complaint, Exhibit C), that the plaintiff's business

> "• • • is in conflict with the Laws of the State of New York and, therefore, would be illegal."

9. This opinion of the New York Attorney General and determination by the State Liquor Authority, was contrary to the rulings of the U. S. Treasury Department, Bureau of Customs and the New York State Tax Commission—to say nothing of the federal Constitutional and statutory provisions on which they rest.

10. Its practical effect was to drive the plaintiff out of business. As Judge Bicks also found:

> "The New York Importers & Distillers Association circularized its members advising that in view of the position of the Attorney General and of §62 of the Alcoholic Beverage Control Law, they could not

Affidavit of Charles H. Tuttle in Support of Application to Quash Subpoena, Verified November 25, 1960

legally fill plaintiff's orders. Plaintiff has not since been able to make purchases to meet its requirements and faces the prospect of closing its doors, with consequent substantial damage."

Hence, the plaintiff is threatened with immediate, irreparable injury.

The Institution of this Action

11. This action was accordingly instituted on July 22, 1960. The complaint alleges that the provisions of the New York State Alcoholic Beverage Control Law, as applied to the plaintiff, are unconstitutional under (i) the Commerce clause, (ii) the clause prohibiting a State from laying imposts or duties on imports and exports without the consent of Congress, and (iii) the Supremacy clause of the Constitution of the United States.

12. The complaint further alleges that the Tariff Act of 1930, as amended, 19 U. S. C. §1311, and the regulations thereunder, together with the applicable provisions of the Internal Revenue Code, 26 U. S. C. §§5521, 5522, constitute a comprehensive, exclusive and preemptive scheme duly adopted by Congress for the regulation, encouragement and promotion of foreign commerce in, and export of, bonded wines and liquors.

13. The plaintiff insists that the State of New York may not trespass on this exclusively Federal sphere.

14. Accordingly, a motion for the impanelling of a three-judge court pursuant to 28 U. S. C. §§2281-4 and an application, by order to show cause, for a temporary injunction were filed and served simultaneously with the complaint.

Affidavit of Charles H. Tuttle in Support of Application to Quash Subpoena, Verified November 25, 1960

The Defendants' Position

15. The defendants assert, as already noted, that the plaintiff's business consists of "sales" of liquor in New York; but since the New York Alcoholic Beverage Control Law does not expressly provide for a license for such sales for export, the defendants claim the plaintiff's business is forbidden and illegal under that State Law.

16. The defendants appeared by the Attorney-General of the State of New York and cross-moved to dismiss the complaint on the ground, among others, that:

> "It presents no actual controversy;
>
> * * *
>
> "The state courts afford a plain, speedy and efficient remedy by suit for injunction to the plaintiff and that the construction of the State Statutes should first be determined by the State Courts."

17. In connection with their assertion that this case "presents no actual controversy," the defendants' supporting brief (pp. 9-10) asserted:

> "*Since the plaintiff is a non-licensee there is no real action the State Liquor Authority can take against the plaintiff.*"

18. As for their contention that the plaintiff has an adequate remedy in the State courts, the defendants' brief (p. 10) pointed to Section 121 of the Alcoholic Beverage Control Law as affording a possible remedy, but in the same breath asserted that the statute was inapplicable. To quote the defendants:

Affidavit of Charles H. Tuttle in Support of Application to Quash Subpoena, Verified November 25, 1960

> "The plaintiff has an adequate remedy in the State Courts. Section 121 of the Alcoholic Beverage Control Law, hereinbefore quoted, provides that the issuance of any order of warning of the Liquor Authority may be reviewed in the State Supreme Court. By no stretch of the imagination, however, can the above-mentioned notice given the plaintiff, be construed as an order of warning. Even if it were so construed, there is no power of its own with which the Authority could back up such order of warning."

Moreover, Section 121 plainly does *not* afford an adequate remedy, as Judge Rayfiel held in *Barad v. State Liquor Authority of the State of New York*, 160 F. Supp. 161, 165, for it permits a stay *for thirty days only*, and the period cannot be extended. (*Matter of Yacht Club v. Bruchman*, 276 N. Y. 44.)

Judge Bicks' Decision and the Plaintiff's Appeal

19. In his decision of November 4, 1960, Judge Bicks formulated "the threshold issue" to be:

> "' ' ' whether the federal courts should accept jurisdiction ~~now~~ since the issues have never been presented to or passed upon by the state courts."

20. Judge Bicks resolved this question adversely to the plaintiff, holding:

> "Although the substantive issues raised in the complaint may not be considered by the judge to whom application under 28 U.S.C.A. §2281 is made, he has the power to retain jurisdiction pending state court adjudication where, as here, there is insuffi-

cient basis to support intervention by a federal court of equity. (Citing cases)

"Motion for impanelling of a three-judge court denied, with leave to renew after the state court has ruled."

21. The plaintiff promptly appealed to the Court of Appeals from Judge Bicks' decision by notice of appeal (Exhibit C, hereto) which was served by the plaintiff on November 17, 1960, filed on November 18, 1960, and reserved by the Clerk on November 23, 1960. The record has been docketed in the Court of Appeals and is in the hands of the printer.

The State Liquor Authority Precipitately Served This Subpoena, Contrary to the Defendants' Representations Before Judge Bicks, In A Manifest Effort To Prejudice The Plaintiff's Efforts to Pursue Its Legal Remedies In the Courts

22. Five days *after* the plaintiff's notice of appeal had been served on the defendants' attorney on November 17, 1960, this subpoena *duces tecum* was issued and served on the plaintiff by the State Liquor Authority under date of November 22, 1960.

23. The subpoena is returnable November 29, 1960 and commands the plaintiff to appear and "give evidence relating to the business being conducted" by it "*under the license to sell alcoholic beverages issued by the State Liquor Authority.*"

24. The defendants' whole position, however, predicates that *the plaintiff does not have, and cannot be issued, any such license.*

Affidavit of Charles H. Tuttle in Support of Application to Quash Subpoena, Verified November 25, 1960

25. The State Liquor Authority expressly rested its determination that the plaintiff's business "is in conflict with the Laws of the State of New York" and "illegal" on the opinion of the New York State Attorney-General, who represents the defendants here, that

> "* * * the Alcoholic Beverage Control Law and rules of the State Liquor Authority do not at present afford any license for this type of action."

26. In successfully persuading Judge Bicks to refuse the plaintiff's applications for a three-judge court and for temporary injunctive relief, the defendants, through the New York State Attorney-General, expressly represented in their brief (pp. 9-10), "*Since the plaintiff is a non-licensee, there is no real action the State Liquor Authority can take against the plaintiff.*" Their motion and supporting brief before Judge Bicks emphasized and re-emphasized their contention that "The plaintiff has an adequate remedy in the State *Courts.*"

27. Having induced Judge Bicks to refuse the relief requested by the plaintiff with these representations, however, the State Liquor Authority now attempts by this subpoena to reverse its field, and to precipitate the plaintiff before itself as prosecutor, judge and jury to pass on its own attack upon the plaintiff's asserted federal constitutional rights.

28. This *volte face* can have but one purpose, I submit: to frustrate the plaintiff's appeal, already taken to review Judge Bicks' decision and order, and to prejudice the plaintiff's attempt to secure redress of its rights in the Courts,—even in the State Courts to which Judge Bicks'

Affidavit of Charles H. Tuttle in Support of Application to Quash Subpoena, Verified November 25, 1960

decision and order consigned the plaintiff at the defendants' behest.

29. The plaintiff, in short, is the proverbial "little fellow", caught in the gears between the machinery of the Federal and State Governments. The defendants should not, I submit, be permitted to put that machinery precipitately into motion while the plaintiff is attempting to extricate itself in accordance with its lawful rights.

30. I respectfully request, therefore, that this subpoena be quashed, so that the plaintiff may pursue its lawful rights and remedies in due course.

31. No previous application for this relief has been made.

(Sworn to by Charles H. Tuttle on November 25, 1960.)

Exhibit A Annexed to Tuttle Affidavit

(Subpoena Duces Tecum)

STATE OF NEW YORK

EXECUTIVE DEPARTMENT

DIVISION OF ALCOHOLIC BEVERAGE CONTROL

Re: Serial No.

THE PEOPLE OF THE STATE OF NEW YORK

To:

Idlewild Bon Voyage Liquor Corp.,
New Arrivals Building,
N. Y. Internatl. Airport, Idlewild, NY.

Greeting:

WE COMMAND YOU, that all business and excuses being laid aside, you and each of you appear and attend before the State Liquor Authority of the State of New York, on the 29th day of November, 1960, at 10:00 o'clock in the forenoon of that day or any adjourned date thereof, at 270 Broadway, New York, N. Y. Room 414, to testify and give evidence relating to the business being conducted by Idlewild Bon Voyage Liquor Corp., New York International Airport, at premises located at New York International Airport, N. Y. under the license to sell alcoholic beverages issued by the State Liquor Authority.

AND THAT YOU BRING WITH YOU and then and there produce the following books and papers: all records of

purchases and sales of alcoholic beverages from inception of Business to date.

AND, FOR FAILURE TO ATTEND, you will be liable to pay all loss and damage sustained thereby, and Fifty Dollars in addition thereto, and be subject to such other penalties as are prescribed by law.

WITNESS: THE STATE LIQUOR AUTHORITY OF THE STATE OF NEW YORK, the 22nd day of November One Thousand Nine Hundred and Sixty.

WALTER C. SCHMIDT
Deputy Commissioner

Exhibit B Annexed to Tuttle Affidavit

(Opinion and Order of Judge Bicks, Dated November 4, 1960)

(Printed herein at pages 49a to 55a.)

Exhibit C Annexed to Tuttle Affidavit

(Notice of Appeal, Dated November 16, 1960)

(Printed herein at page 56a.)

Plaintiff's Supplemental Notice of Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Dated December 1, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of Charles H. Tuttle, verified December 1, 1960; the annexed affidavit of John F. Kelly, verified December 1, 1960; upon the decision and order of Honorable Alexander Bicks herein, dated and filed November 4, 1960; upon the pleadings and all the proceedings heretofore had herein, the plaintiff will move this Court at Room 506, United States Court House, Foley Square, New York, N. Y., on the 6th day of December, 1960, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order enjoining and restraining the defendants, and each of them, from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business during the pendency of this action.

PLEASE TAKE FURTHER NOTICE that this motion will be brought on for hearing together with and supplementary to the plaintiff's application, by Order to Show Cause issued November 25, 1960, by the Honorable Lloyd F. MacMahon, for an order quashing a certain subpoena dated November 22, 1960, directed to the plaintiff and issued by the New York State Liquor Authority, of which the defendants are the Chairman, Members and Commissioners, respectively.

Plaintiff's Supplemental Notice of Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Dated December 1, 1960

PLEASE TAKE FURTHER NOTICE that the plaintiff will apply for, and will renew its application for, the empaneling of a three-judge court, pursuant to 28 U. S. C. §§2281-2284, to determine this supplemental motion and the aforesaid application if and to the extent that such a three-judge court may be required by law.

PLEASE TAKE FURTHER NOTICE that the plaintiff will move for such other and further relief as may be just.

Dated: New York, N. Y., December 1, 1960.

Yours, etc.

Kelly & Schwartz
Attorneys for Plaintiff

To:

Honorable Louis J. Lefkowitz
Attorney General of the State of New York
Attorney for Defendants

Supplemental Affidavit of Charles H. Tuttle in Support of Supplemental Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Verified December 1, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

State of New York, }
County of New York, } ss.:

CHARLES H. TUTTLE, being duly sworn, says: I am counsel for the plaintiff.

Nature of this Supplemental Motion

1. I make this affidavit in support of the plaintiff's supplemental motion to enjoin and restrain the defendants, being the Chairman, Members and Commissioners, respectively, of the New York State Liquor Authority, from hindering, affecting or in any way interfering with the plaintiff or its business during the pendency of this action.

2. This motion is returnable simultaneously with the plaintiff's application, by order to show cause issued by the Honorable Lloyd F. MacMahon on November 25, 1960, for an order quashing a subpoena, dated November 22, 1960, directed to the plaintiff and issued by the New York State Liquor Authority of which the defendants, as already noted, are th Chairman, Members and Commissioners, respectively.

Supplemental Affidavit of Charles H. Tuttle in Support of Supplemental Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Verified December 1, 1960

History of this Action

3. As stated in my affidavit in support of the aforesaid order to show cause, the plaintiff sells liquor solely for export at premises leased from the New York Port Authority at Idlewild Airport.

4. This action is brought pursuant to Chapter 155 of the Judicial Code, 28 U.S.C. §§2281-4, for an injunction restraining the defendants from attempting to enforce the New York Alcoholic Beverage Control Law against the plaintiff because the provisions of that Law, as attempted to be applied to the plaintiff, would be unconstitutional and repugnant to the Commerce Clause, the Supremacy Clause and the clause prohibiting a state from laying impost or duties upon imports or exports without the consent of Congress, in violation of the Federal Constitution. The complaint also alleges that application to the plaintiff of the New York State Alcoholic Beverage Control Law would trespass and infringe upon the scheme adopted by Congress for the encouragement of exports of bonded wines and liquors pursuant to the Tariff Act of 1930 as amended, 19 U.S.C. §1311, and regulations thereunder, together with the applicable provisions of the Federal Internal Revenue Code, 26 U.S.C. §§5521 and 5522.

5. The defendants moved to dismiss this action on the ground, among others, that it presents no actual controversy and that the plaintiff should be remitted to the State courts to pursue its remedies there in the first instance.

Supplemental Affidavit of Charles H. Tuttle in Support of Supplemental Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Verified December 1, 1960

6. In their supporting brief the defendants asserted:

> "The complaint makes no claim that the State Liquor Authority is threatening, directly or indirectly, to take steps to interfere with plaintiff's operations. Since the plaintiff is a non-licensee, there is no real action the State Liquor Authority can take against the plaintiff."

The plaintiff's motions to empanel a three-judge court and for a temporary injunction, together with the defendants' cross-motion to dismiss, came on before Judge Bicks.

7. In his decision of November 4, 1960, Judge Bicks, evidently relying on the aforesaid representations made by the defendants, held that this case was then in a "tentative and hypothetical posture" and that the plaintiff should be remitted to the State courts in the first instance. Accordingly, Judge Bicks refused the interlocutory injunctive relief sought by the plaintiff and denied the plaintiff's motion to empanel a three-judge court; but retained jurisdiction with leave to renew.

8. The plaintiff promptly appealed Judge Bicks' denial of injunctive relief.

The Defendants' Retaliatory Action

9. Five days after the plaintiff's notice of appeal was served on the defendants' attorney on November 17, 1960, the State Liquor Authority issued the *subpoena duces tecum*, dated November 22, 1960, which is the subject of

Supplemental Affidavit of Charles H. Tuttle in Support of Supplemental Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Verified December 1, 1960

the plaintiff's application to quash, returnable simultaneously with this motion.

10. Notwithstanding the defendants' representations before Judge Bicks that "since the plaintiff is a non-licensee, there is no real action the State Liquor Authority can take against the plaintiff", the subpoena required the plaintiff to appear and testify concerning its business "under the license to sell alcoholic beverages issued by the State Liquor Authority".

11. The plaintiff obtained its order to show cause to quash the subpoena late in the afternoon of Friday, November 25, 1960, from the Honorable Lloyd F. MacMahon of this Court, and the order to show cause was duly served on the attorney for the defendants on November 28, 1960.

Two days later, on November 30, 1960, as appears from the annexed affidavit of John F. Kelly, the defendants attempted to shut off the plaintiff's supply of bonded liquors, thereby driving the plaintiff out of business, by representations to the interstate trucking firm which made deliveries to the plaintiff from its out-of-state suppliers, to which the plaintiff had been driven as a result of the refusal of the plaintiff's usual suppliers to fill the plaintiff's orders as a result of the opinion of the New York Attorney General and the defendants' determination that the plaintiff's business is assertedly illegal under New York law.

Supplemental Affidavit of Charles H. Tuttle in Support of Supplemental Motion for Temporary Injunction and for the Empanelling of a Three-Judge Court, Verified December 1, 1960

Unless the Defendants are Restrained, the Plaintiff will be Driven out of Business and with Consequent Irreparable Damage

12. Accordingly, I submit, the defendants have gone back on the representations on which they induced Judge Bicks to refuse injunctive relief and to remit the plaintiff to the State court, and are now attempting by every conceivable threat and harassment to prejudice the plaintiff's attempt to secure an adjudication of his rights and to drive him out of business, with consequent irreparable damage.

13. The defendants' retaliatory actions put this case in an entirely new light, and it is no longer in the "tentative and hypothetical posture" which the defendants asserted and Judge Bicks adopted.

14. I therefore respectfully request that the defendants be enjoined and restrained from taking any action to interfere with the plaintiff or its business during the pendency of this action.

15. The plaintiff respectfully requests that a three-judge court be convened if and to the extent that it is necessary to do so to herein determine this application and to grant the plaintiff appropriate relief.

(Sworn to by Charles H. Tuttle on December 1, 1960.)

Affidavit of John F. Kelly in Support of Plaintiff's Supplemental Motion for Temporary Injunction and for Empanelling of a Three-Judge Court, Verified December 1, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

State of New York,)
County of New York,) ss.:

JOHN F. KELLY, being duly sworn, says:

I am an attorney at law, maintaining offices for the practice of law at 1780 Broadway, New York 19, N. Y.

On December 1st, 1960, I called the offices of George's Transportation Co. Inc., at 174 Perry Street, New York City, N. Y., and spoke to Mr. Hanz. He identified himself as Manager of the said company.

Mr. Hanz stated that his company is engaged in the trucking business and is licensed by the United States Bureau of Customs and the New York State Liquor Authority in connection with its foregoing operations; and that his license from the United States Customs Bureau authorized him to transport liquor which was in customs bond and in interstate commerce and for foreign commerce.

I inquired from Mr. Hanz as to an overdue shipment of liquor which had been destined from Baltimore, Maryland, to Idlewild Bon Voyage Liquor Corp., at New York International Airport and for which the said company was the carrier from Baltimore to Idlewild Airport. This liquor was in federal customs bond and was of the class stated in the complaint herein.

Affidavit of John F. Kelly in Support of Plaintiff's Supplemental Motion for Temporary Injunction and for Empanelling of a Three-Judge Court, Verified December 1, 1960

Mr. Hanz stated that two representatives of the State Liquor Authority had visited his office on Wednesday, November 30th, 1960, and he identified the men as Mr. Harry Newman and Mr. Heelan, who had given their telephone numbers as BArclay 7-1616, Extension 7215,—the office of the State Liquor Authority.

Mr. Hanz further stated that the said representatives of the State Liquor Authority, speaking in their official capacity, had warned him that Idlewild Bon Voyage Liquor Corp. is a non-licensed receiver; that therefore he could not lawfully deliver any liquor to that corporation; and that such delivery would be in violation of his license from the Authority.

Mr. Hanz stated to deponent that he could not take a chance on losing his license and therefore he would not make any further deliveries to Bon Voyage Liquor Corp., in view of the warning from the State Liquor Authority.

Deponent inquired whether Mr. Hanz would make an affidavit as to the foregoing facts, and Mr. Hanz stated that he was fearful of losing his license from the State Liquor Authority and therefore he would have to consult with his attorney before he would sign the affidavit as to the foregoing.

(Sworn to by John F. Kelly on December 1, 1960.)

Supplemental Affidavit of John F. Kelly in Support of Plaintiff's Motion, Verified December 5, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

State of New York, }
County of New York, } ss.:

JOHN F. KELLY, being duly sworn, deposes and says:

I am counsel for the plaintiff.

On December 5th, 1960, I called the office of Overland Motor Freight Co. Inc., at 459 West 19th Street, New York City, New York, and spoke to Mr. William Hinchy, the dispatcher for the said company, and inquired as to a shipment of Customs Bonded Liquor destined for Idlewild Bon Voyage Liquor Corp.

Mr. Hinchy advised that two representatives of the New York State Liquor Authority, Mr. William Heelan and Mr. Harry Newman, had visited his office and had identified themselves as representatives of the New York State Liquor Authority, and had given their telephone number as BA 7-1616, Extensions 7118 and 7215, which is the telephone number of the New York State Liquor Authority.

Mr. Hinchy stated that the said representatives of the New York State Liquor Authority advised him that Idlewild Bon Voyage Liquor Corp., is an unlicensed liquor dealer and therefore he would not make any deliveries to it.

Mr. Hinchy advised deponent that his company is a bonded interstate carrier and is authorized to carry Cus-

Supplemental Affidavit of John F. Kelly in Support of Plaintiff's Motion, Verified December 5, 1960

toms Bonded Merchandise but it does not have a license from the New York State Liquor Authority.

Mr. Hinchy stated further that even though his company had no license from the New York State Liquor Authority, it would not make a delivery where any Federal, State or City agency said that such delivery would be unlawful.

Mr. Hinchy said "We may be looking for a liquor license from the State of New York next week or next month or next year, and then where would this company be if we went and made a delivery to Bon Voyage Liquor Corp., after they had told us not to do so."

Mr. Hinchy further stated that the said representatives of the New York State Liquor Authority had informed him that they were visiting various trucking concerns on this matter and that they had been to three other carriers before coming to him.

(Sworn to by John F. Kelly December 5, 1960.)

Affidavit of Walter C. Schmidt in Opposition to Plaintiff's Application to Quash Subpoena, Verified December 2, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

State of New York, }
County of New York, } ss.:

WALTER C. SCHMIDT, being duly sworn, says that he is a Deputy Commissioner of the New York State Liquor Authority, and is familiar with the facts and circumstances hereinafter set forth.

The New York State Liquor Authority is engaged presently in an investigation to determine whether any holders of licenses or permits issued by the New York State Liquor Authority are violating the provisions of the Alcoholic Beverage Control Law or the terms of the licenses and permits issued to them by selling or delivering alcoholic beverages to Idlewild Bon Voyage Liquor Corporation, a corporation organized and existing under the laws of the State of New York which is not the holder of any license or permit issued by the New York State Liquor Authority and the extent to which the corporation itself is trafficking in alcoholic beverages in this State.

In the course of such investigation, the New York State Liquor Authority issued and caused to be served upon Idlewild Bon Voyage Liquor Corporation the subpoena which is the subject of the motion now before this Court.

Affidavit of Walter C. Schmidt in Opposition to Plaintiff's Application to Quash Subpoena, Verified December 2, 1960

The proposed examination by the New York State Liquor Authority is for the purpose of eliciting from the corporation information as to the source of the alcoholic beverages it is presently engaged in selling at its place of business at New York International Airport, Jamaica, Queens County, New York, and details as to its method of operation.

It is submitted respectfully that the motion should be denied in all respects.

(Sworn to by Walter C. Schmidt December 2, 1960.)

Affidavit of Philip Watson in Opposition to Plaintiff's Motion for Temporary Injunction, Verified December 5, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

State of New York, }
County of New York, } ss.:

PHILIP WATSON, being duly sworn, deposes and says:

That he is an Assistant Attorney General of the State of New York, in the office of Attorney General Louis J. Lefkowitz, Attorney for the defendants named in the above-entitled action, and is generally familiar with all the facts and circumstances thereof.

This affidavit is made in opposition to the motion of the plaintiff for an order staying the defendants from, among other things, interfering with the plaintiff's business.

Deponent respectfully submits that no facts have been stated in plaintiff's moving papers showing that the State Liquor Authority is interfering with the business operations of the plaintiff, or is threatening or is about to take steps, directly or indirectly, to interfere with plaintiff's business operations, except to refer to a subpoena served upon the plaintiff by the State Liquor Authority demanding that it appear, testify and give evidence relating to its business and to bring with it all records of purchases and sales of alcoholic beverages.

Deponent verily believes and respectfully submits that the real purpose of the plaintiff in making this motion is not only to stay the enforcement of the said subpoena, but also to enjoin the State Liquor Authority from exercising

Affidavit of Philip Watson in Opposition to Plaintiff's Motion for Temporary Injunction, Verified December 5, 1960

the powers and jurisdiction conferred upon it by the New York State Alcoholic Beverage Control Law, particularly §17, subds. 7 and 10, wherein and whereby the State Liquor Authority is authorized to inspect or to provide for the inspection of any premises where alcoholic beverages are sold and to hold hearings, subpoena witnesses, compel their attendance, etc., and to require the production of any books or papers relative to the inquiry.

Your deponent verily believes and respectfully submits that the basic claim of the plaintiff is that the statutes in question as applied to the plaintiff, or if applied to the plaintiff, are unconstitutional.

Your deponent verily believes that a determination of the issues thus raised by the plaintiff, under the decision of Judge Bicks dated November 4, 1960, must be deferred until the State Court has ruled.

Your deponent further believes and respectfully submits that since an appeal has been taken from the order of Judge Bicks, the District Court has no jurisdiction to entertain this motion.

Your deponent also believes and respectfully submits that in all events it has not been shown how any great or irreparable injury could be caused the plaintiff by an exercise of the powers and jurisdiction provided by Alcoholic Beverage Control Law §17, subds. 7 and 10.

WHEREFORE, by virtue of all of the foregoing, your deponent requests that the motion of the plaintiff be denied with costs.

(Sworn to by Philip Watson on December 5, 1960.)

Notice of Entry of Stay Orders

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SIRS:

PLEASE TAKE NOTICE that on the plaintiff's application, by order to show cause issued by the Honorable Lloyd F. MacMahon on November 25, 1960, to quash a certain subpoena *duces tecum* dated November 22, 1960, directed to the plaintiff, and issued by the State Liquor Authority of which the defendants are the Chairman, Members and Commissioners, which order to show cause contains a stay enjoining the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them from taking any action pursuant to the aforesaid subpoena, there has been endorsed a further stay as follows:

> "Stay continued pending determination of motion. 12/7/60.
>
> /s/ Edward J. Dimock,
> U. S. D. J."

PLEASE TAKE FURTHER NOTICE, that on the plaintiff's Supplemental Notice of Motion, dated December 1, 1960, for an order, among other things, enjoining and restraining the defendants, and each of them, from taking any action to hinder, harass or in any manner interfere with

Notice of Entry of Stay Orders

the plaintiff or the plaintiff's business during the pendency of this action, there has been endorsed a stay as follows:

> "Stay granted pending determination of motion. 12/7/60.
>
> s/ Edward J. Dimock,
> U. S. D. J."

Kelly & Schwartz
Attorneys for Plaintiff

To:

Honorable Louis J. Lefkowitz
Attorney General of the State
of New York

Hyman Amsel, Esq., Counsel
State Liquor Authority

Opinion of Judge Dimock, Dated December 28, 1960

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM

DIMOCK, D.J.

Plaintiff makes two motions, one for an injunction restraining defendants, constituting officials of the New York State Liquor Authority, from taking any action to hinder, harass or in any manner interfere with plaintiff or plaintiff's business during the pendency of this action, and the other to quash a subpoena issued by defendants requiring appearance and production of records by plaintiff.

The action is one for declaratory judgment that, as applied to plaintiff, section 3 subdivision 28, section 62, and section 100 subdivisions 1 and 2 of the Alcoholic Beverage Control Law of the State of New York and all other provisions of said law which defendants might claim would affect plaintiff's operation are unconstitutional under the commerce clause, U. S. Const. art. 1, §8, and the clause prohibiting states from imposing duties on imports and exports without the consent of Congress, U. S. Const. art. 1, §10, and as being preempted by the Tariff Act of 1930, 19 U. S. C. §1311, and by associated provisions of the Internal Revenue Code, 26 U. S. C. §§5521 and 5522. The complaint also seeks an injunction against the enforcement of those provisions of the Alcoholic Beverage Control Law.

A motion for a preliminary injunction in the terms of that prayed for in the complaint was denied by Judge Bicks with an opinion dated November 4, 1960.

Opinion of Judge Dimock, Dated December 28, 1960

Insofar as the present motion seeks a preliminary injunction it is a mere renewal of the motion made before Judge Bicks. An appeal from his order denying that motion is now pending undetermined in the Court of Appeals. That appeal removed the subject matter of the motion for a preliminary injunction from this court to the Court of Appeals and this court is without jurisdiction to issue a preliminary injunction in those terms. Rico Mfg. Co., Inc. v. Trico Products Corp., 1 Cir., 75 F. 2d 706, 707; Brick v. A. I. Namm & Sons, Inc., D.C.E.D.N.Y., 21 F. 2d 179. Doubtless the appeal would not have that effect if a state of facts which might have warranted a different decision by Judge Bicks were presented. The sole reason assigned by Judge Bicks for denial of the motion was, however, that plaintiff had not exhausted the state remedies open to him. Nothing has occurred since the decision which would tend to obviate the necessity of exhausting state remedies. I am thus without jurisdiction to grant an injunction pendente lite.

Plaintiff, however, seeks in the alternative an injunction pending appeal. No such application was ever made to Judge Bicks so that the question is an open one. I do not regard it as the same as the question which he decided when he denied the motion for an injunction pendente lite. Less need be shown to warrant an injunction pending an appeal than one for an injunction pendente lite.

In support of this branch of its application plaintiff invokes Rule 62(c) F. R. Civ. P. which provides:

> "(c) Injunction pending appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of

the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party."

Plaintiff has a place of business in Idlewild Airport. I will describe its business as plaintiff describes it in its papers. Its customers are prospective travelers to foreign countries from Idlewild Airport. They order and pay for liquor which plaintiff places on the plane with the passenger but to which the passenger has no access until his arrival in the foreign country. This liquor comes from Government bonded warehouses under bond until delivery on board the airplane and is not subject to United States tax so that it can be purchased at a substantial saving. Plaintiff has made arrangements with the United States Customs Bureau and the Internal Revenue Department under which permission to carry on this business has been granted.

The Attorney General of the State of New York has issued an opinion to the effect that the business so carried on by plaintiff is unlawful under the New York Alcoholic Beverage Control Law. Defendants have therefore advised plaintiff that they have determined that the operation of plaintiff's business is in conflict with the laws of the State of New York and is therefore illegal. Plaintiff made proof before Judge Bicks that the New York Importers & Distillers Association had circularized its members advising that, in view of the position of the Attorney General, under section 62 of the Alcoholic Beverage Control Law, they could not legally fill plaintiff's orders. Judge Bicks found that plaintiff has not since then been able to make purchases or meet its requirements and that it faces the prospect of closing its doors with consequential damage.

Opinion of Judge Dimock, Dated December 28, 1960

In spite of this, Judge Bicks refused a preliminary injunction pendente lite because plaintiff did not exhaust the state remedies available to it. Were the question before me the same as that before Judge Bicks, even had I jurisdiction to pass on the question and reach a different result I would be constrained to follow Judge Bicks. The question before me is not, however, the same. The application before him was for an injunction pending trial and I am now considering an application for an injunction pending appeal. The hardship to the defendant of an injunction pending appeal is lighter than the injunction pending trial by just so much as the duration of the injunction pending trial exceeds the duration of an injunction pending appeal. Thus I may consider the application for an injunction pending appeal as a new question. I find that the hardship to plaintiff in the disruption of its business outweighs such hardship as the Liquor Authority might suffer during the comparatively short period of time required for the presentation and decision of the appeal. Plaintiff has presented evidence that defendants have notified at least one of the truckers delivering merchandise to plaintiff that the trucker is assisting in violations of the law and that the trucker is consequently refusing to make deliveries. Defendants openly avow their purpose to obtain, by means of a subpoena which has been served, the names of those who are supplying merchandise to plaintiff and it is a fair inference that the suppliers will be warned against aiding and abetting the performance of the allegedly illegal acts. Plaintiff certainly raises a serious legal issue when it states that what New York is regarding as unlawful has been ruled by the United States to be lawful foreign commerce. Plaintiff is entitled to an injunction against harassment by defendant pending the appeal from the order of Judge Bicks.

Opinion of Judge Dimock, Dated December 28, 1960

There remains the matter of the motion to quash the subpoena. An affidavit submitted on behalf of defendants states that the purpose of the examination sought is two-fold: first, to get the names of plaintiff's suppliers and, second, to ascertain whether plaintiff is violating the law.

Plaintiff is entitled, for the reasons above set out, to an injunction pending the appeal forbidding communication by defendants with any of plaintiff's suppliers whose names appear in any evidence or testimony obtained by plaintiff as a result of the subpoena and the injunction will so provide.

I pass now to the phase of the motion to quash the subpoena directed at the subpoena insofar as it seeks merely an examination on the subject of violations of law by plaintiff. Even if I were disposed to grant that relief I could not do so in this law suit. Neither by its allegations of fact nor by its prayer does the complaint raise any issue as to defendants' right to subpoena plaintiff to give testimony as to whether it is conducting operations more extensive than those for which plaintiff seeks protection.

Since the injunction will protect plaintiff, pending the appeal, against use against it of the fruits of the subpoena insofar as they constitute evidence with respect to its avowed activities and since I have no power in this law suit to quash the subpoena insofar as it seeks evidence of other alleged infractions of law, the motion to quash will be denied.

Settle order on notice. Bond in the sum of $1,000 will be required. All existing stays are continued pending entry of the order.

Dated: December 28, 1960

E. Dimock
United States District Judge

Order of Judge Dimock, Dated January 4, 1961

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

The plaintiff having moved for an order temporarily enjoining and restraining defendants, and each of them, from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business during the pendency of this action or, in the alternative, during the pendency of the plaintiff's appeal from the decision and order of the Honorable Alexander Bicks herein, dated November 4, 1960; and the plaintiff having further applied for, and renewed its application for, the empanelling of a three-judge court; and the plaintiff having further applied for an order quashing a certain subpoena *duces tecum*, dated November 22, 1960 and returnable November 29, 1960, directed to the plaintiff, and issued by the New York State Liquor Authority of which the defendants are the Chairman, Members and Commissioners respectively; and said motions having duly come on to be heard before me on December 7, 1960; and Kelly & Schwartz, attorneys for plaintiff, by Charles H. Tuttle, Esq., having appeared in support thereof, and Louis J. Lefkowitz, Esq., attorney for defendants, by Philip Watson, Esq., having appeared in opposition thereto;

Now, on reading and filing the plaintiff's application to quash the aforesaid subpoena *duces tecum* by order to show cause issued by the Honorable Lloyd F. MacMahon on November 25, 1960, the affidavit of Charles H. Tuttle, verified November 25, 1960, together with the exhibits annexed thereto, in support of the said application, and the affidavit of Walter C. Schmidt, verified December 2, 1960, in opposition thereto; the plaintiff's supplemental

Order of Judge Dimock, Dated January 4, 1961

notice of motion, dated December 1, 1960, for a temporary injunction and for other relief, as aforesaid, the supplemental affidavit of Charles H. Tuttle, verified December 1, 1960, the affidavit of John F. Kelly, verified December 1, 1960, and the affidavit of John F. Kelly, verified December 5, 1960, all in support of the said motion, and the affidavit of Philip Watson, verified December 5, 1960, in opposition thereto, and due deliberation having been had thereon, and on filing the opinion of the Court, dated December 28, 1960, it is hereby

ORDERED that the plaintiff's motion for a temporary injunction pending the trial of this action and for the empanelling of a three-judge court be, and the same hereby is, denied; and it is further

ORDERED that the plaintiff's application to quash the aforesaid subpoena *duces tecum* be, and the same hereby is, denied; and it is further

ORDERED that the plaintiff's motion for an order temporarily enjoining and restraining the defendants, from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business during the pendency of the plaintiff's appeal from the decision and order of the Honorable Alexander Bicks herein, dated November 4, 1960, be, and the same hereby is, granted, and the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them are hereby enjoined and restrained from taking any action to hinder, harass, or in any manner interfere with the plaintiff or the plaintiff's business during the pendency of the aforesaid appeal, and it is further

Order of Judge Dimock, Dated January 4, 1961

ORDERED that the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them, are hereby enjoined and restrained from communicating with respect to the plaintiff or the plaintiff's business with any of the plaintiff's suppliers whose names appear in any evidence or testimony which may be obtained from the plaintiff as a result of the aforesaid subpoena *duces tecum;* and it is further

ORDERED that the plaintiff will be required to post a bond in the sum of One Thousand Dollars ($1,000.00) pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.

Dated: New York, N. Y., January 4, 1961

EDWARD J. DIMOCK
U. S. D. J.

Plaintiff's Notice of Appeal from Decision and Order of Judge Dimock, Dated January 6, 1961

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SIR:

PLEASE TAKE NOTICE that Idlewild Bon Voyage Liquor Corporation, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the decision and order of the Honorable Edward J. Dimock herein, dated December 28, 1960 and January 4, 1961, respectively, insofar as the said decision and order refused the plaintiff's motion for a temporary injunction pending the trial of this action; denied the plaintiff's motion for the empanelling of a three-judge court; and denied the plaintiff's application to quash a certain subpoena *duces tecum*, dated November 22, 1960, directed to the plaintiff, and issued by the New York State Liquor Authority of which the defendants are the Chairman, Members and Commissioners, respectively.

Dated: New York, N. Y., January 6, 1961.

Yours, etc.

KELLY & SCHWARTZ
Attorneys for Plaintiff

To

Hon. LOUIS J. LEFKOWITZ
Attorney-General of the State of New York
Attorney for Defendants

Notice of Motion to Dismiss Appeal

SIRS:

PLEASE TAKE NOTICE that upon the order of Judge Bicks entered herein on November 4, 1960, denying plaintiff's motion for impanelling a three-judge court and for other relief, and upon the notice of appeal from such order dated November 16, 1960, the undersigned will move this Court for an order dismissing this appeal on the ground that the order appealed from is not appealable, and for such other, further and different relief as this Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that this motion will be brought on for hearing before the United States Court of Appeals for the Second Circuit on the 16th day of January, 1961, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Dated: New York, N. Y., January 12, 1961

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for the Appellees

To:

KELLY & SCHWARTZ, Esqs.
Attorneys for Appellant

Memorandum of Points

The appellees, above-named, intend to raise the following points in support of the motion to dismiss the appeal.

This Court lacks jurisdiction of the appeal.

1. The order appealed from is not a final decision within the meaning of 28 U. S. C., Section 1291.

2. The order appealed from is not an interlocutory order refusing an injunction within the meaning of 28 U. S. C., Section 1292.

Consequently, this Court cannot review the decision appealed from.

Dated: New York, N. Y., January 12, 1961

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for the Appellees

To:

Kelly & Schwartz, Esqs.
Attorneys for Appellant

Notice of Motion to Dismiss Appeal

SIR:

PLEASE TAKE NOTICE that upon the order of Judge Edward J. Dimock dated January 4, 1961 and entered herein on January 6, 1961 denying plaintiff's motion for a temporary injunction, denying motion for the impanelling of a three-judge court, and denying plaintiff's application to quash a subpoena duces tecum; and upon the notice of appeal from such order dated January 6, 1961, the undersigned will move this Court for an order dismissing this appeal on the ground that the order appealed from is unappealable, and for such other, further and different relief as this Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that this motion will be brought on for hearing before the United States Court of Appeals for the Second Circuit on the 16th day of January, 1961, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard.

Dated: New York, N. Y., January 12, 1961

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellees

To:

KELLY & SCHWARTZ, Esqs.
Attorneys for Plaintiff

Memorandum of Points

The appellees, above named, intend to raise the following points in support of the motion to dismiss the appeal:

The Court Lacks Jurisdiction of the Appeal

1. The order appealed from is not a final decision within the meaning of Title 28 U. S. C. §1291.

2. The order appealed from is not an interlocutory order refusing an injunction within the meaning of Title 28 U. S. C. §1292.

Consequently, this Court cannot review the decision appealed from.

Dated: New York, N. Y., January 12, 1961

Yours, etc.,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Appellees

To:

Kelly & Schwartz, Esqs.
Attorneys for Plaintiff

Order

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of January, one thousand nine hundred and sixty-one.

Present:

Hon. Harold R. Medina,
Hon. Henry J. Friendly,
Hon. J. Joseph Smith,
Circuit Judges.

A motion having been made herein by counsel for the appellees to dismiss the appeal of November 4, 1960 for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is adjourned to February 6, 1961 on condition that the appellant shall have filed his brief and appendix prior thereto.

Further ordered that the time to file the appellees' brief be and it hereby is extended until one week after said motion has been decided.

Order

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of January, one thousand nine hundred and sixty-one.

Present:

Hon. HAROLD R. MEDINA,
Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH,
Circuit Judges.

A motion having been made herein by counsel for the appellees to dismiss the appeal of December 28, 1960 for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is adjourned to February 6, 1961 on condition that the appellant shall have filed his brief and appendix prior thereto.

Further ordered that the time to file the appellees' brief be and it hereby is extended until one week after said motion has been decided.

Opinion of the Court of Appeals for the Second Circuit

Before:

LUMBARD, *Chief Judge*,
MADDEN, *Judge, United States Court of Claims,**
and WATERMAN, *Circuit Judge*.

Motions to dismiss appeals from orders of the United States District Court for the Southern District of New York, Alexander Bicks, J., Edward J. Dimock, J., denying motions to impanel a three-judge district court, for a preliminary injunction, and to quash a subpoena, and staying further proceedings pending state court adjudication.

Motions to dismiss granted.

KELLY & SCHWARTZ (Breed, Abbott & Morgan, Charles H. Tuttle, John F. Kelly, Stoddard B. Colby, Stuart H. Johnson, Jr. of counsel), New York City, *for Plaintiff-Appellant*.

LOUIS J. LEFKOWITZ, Attorney General of the State of New York (Philip Watson, Assistant Attorney General, of counsel), Albany, New York, *for Defendants-Appellees*.

WATERMAN, *Circuit Judge*:

Plaintiff filed a complaint against the defendants, members of the State Liquor Authority of the State of New York. It sought declaratory and injunctive relief from actions taken by them pursuant to the New York Alcoholic Beverage Control Law of the State of New York §§3(28), 62 and 100. Plaintiff alleges that defendants' activities were unconstitutional under the U. S. Constitution, being repugnant to (a) the commerce clause, and (b) the clause

* Sitting by designation.

that prohibits a state, without the consent of Congress, from laying any imposts or duties on imports or exports.

Plaintiff applied to the United States District Court for the Southern District of New York, pursuant to 28 U. S. C. §§2281, 2284, for the convening of a three-judge court to hear and determine the controversy. The single-judge district court issued an order directing the defendants to show cause before a three-judge district court why the relief sought by the plaintiff should not be granted. Before the order to show cause came on to be heard defendants moved to dismiss the complaint. It would appear that the application for the impaneling of a three-judge district court, the order to show cause, and the motion to dismiss were simultaneously heard by Judge Bicks, who denied the application for a three-judge district court, and, in effect, granted defendants' motion to dismiss (188 F. Supp. 434 (1960)). The ground for Judge Bicks' action was that no state court had passed upon the constitutional issues raised, and he was of the opinion that the federal courts should abstain from doing so until there had been state adjudication. Implicit in this disposition and opinion is a finding that a substantial federal question existed which could properly be considered by a three-judge district court after some intervening state adjudication. Plaintiff was given leave to renew its motion after a state court had ruled—whenever there should be such a ruling. It should be noted that no state court action involving these parties or these issues was pending at the time.

From this decision and order, *Idlewild Bon Voyage Liquor Corporation* v. *Rohan*, 188 F. Supp. 434 (S. D. N. Y. Nov. 4, 1960) plaintiff filed a notice of appeal, and thereafter plaintiff obtained an order to show cause why defendants should not be enjoined and restrained from interfering with plaintiff's business during the pendency thereof. It also sought to quash an administrative sub-

poena *duces tecum* the defendants issued under the authority of the New York State Beverage Control Law to appear before defendants with its books, and renewed its application for the impaneling of a three-judge district court. Judge Dimock, after a hearing, granted the motion for the interlocutory injunction pending the appeal; denied the motion to quash; and, relying upon Judge Bicks' decision, refused to impanel a three-judge district court. Appellant appeals to us from the rulings adverse to it entered by both judges. Defendants-appellees have now moved for an order dismissing both appeals on the ground that we lack jurisdiction to hear them.

We are of the opinion that we must grant appellees' motion and are required to dismiss these appeals for lack of appellate jurisdiction.

I—*The Order of Judge Bicks*

This order denied the petition to convene a three-judge district court because there had been no prior state adjudication of the issues. The judge relied upon the doctrine of "equitable abstention" originally set forth in *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941) "that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them."[1] There was, however, as we have previously pointed out, no state action pending. Judge Bicks "retained jurisdiction" of the litigation pending state court adjudication. Appellees' argument that this order was not final and hence unappealable under 28 U. S. C. 1291, 1292 is not well taken. No parallel state

[1] *Harrison* v. *NAACP*, 360 U. S. 167, at 176-77. And see Note, 59 Colum. L. Rev. 730 (1959).

actions were pending and there was no state adjudication to await. There was nothing left to be done in the federal courts because the action there had been for all intents and purposes concluded. Appellant was effectively out of court—any action upon its prayer for injunctive relief was indefinitely postponed under these circumstances. There is no bar on this ground to appealability. *See Glen Oaks Utilities, Inc. v. City of Houston*, 280 F. 2d 330 (5 Cir. 1960).

However, the order of Judge Bicks had the effect of dismissing a complaint challenging the constitutionality under the Federal Constitution of a state statute and challenging it because of the way that statute was being applied by the regulatory commission created by it. *Stratton v. St. Louis S. W. Ru.*, 282 U. S. 10 (1930) in clear and unequivocal terms declared that the three-judge district court was meant to be the tribunal to deal with constitutional challenges to state activity. And, recently, in *Florida Lime Growers v. Jacobsen*, 362 U. S. 73 (1960) the Court reaffirmed this position by holding that even where state activity was challenged on both constitutional and nonconstitutional grounds a three-judge district court was the proper tribunal. In *Stratton* the Court said that, since this was so, the district judge to whom an application was made for injunctive relief from the state activity was required to convene a three-judge district court. The Court held that if he failed to do so and dismissed the application on its merits the proper remedy was a writ of mandamus from the Supreme Court (*see e.g. Ex Parte Bransford*, 310 U. S. 354 (1940)), for a Court of Appeals would have no jurisdiction over any matter properly entertainable by a three-judge district court. Of course, strict adherence to the *Stratton* command creates obvious difficulties, for whenever there is a plaintiff's allegation of a constitutional infirmity a single judge is required to re-

quest that a three-judge district court be convened. To deal with this problem a procedure has been developed whereby the district judge to whom the application is made is charged with making a preliminary determination as to whether a "substantial federal question" exists that necessitates the convening of a three-judge district court.[2] Judge Friendly, for our court, in *Bell* v. *Waterfront Commission of New York Harbor*, 279 F. 2d 853 (2 Cir. 1960), traces the development of this procedure, and that case holds that an appeal from a determination that no such substantial federal question exists is properly preferred to the Court of Appeals. Accord, *Stuart* v. *Wilson*, 282 F. 2d 539 (5 Cir. 1960); *Wicks* v. *Southern Pacific Co.*, 231 F. 2d 139 (9 Cir. 1956).

The equitable abstention doctrine referred to by us in this opinion was recently carefully articulated in *Harrison* v. *NAACP*, 360 U. S. 167 (1959), where the Supreme Court remanded a cause for state consideration. The Court reasoned that in order for a federal court to give proper consideration to the issue of constitutionality it should have a finished product before it, i.e., not only the state legislative act but also that act as construed by the state courts. At the same term, in a later opinion, the Court pointed out that a reference of this sort to a state court should not be an automatic reference, *NAACP* v. *Bennett*, 360 U. S. 471 (1959). Moreover, there was no indication that the choice of whether to abstain could be the choice of a single district judge. In *Bennett* the appeal was from and the remand was to a three-judge district court.

The decision to abstain is a very different decision from the preliminary one of determining whether the case in-

2. As previously noted, the question of whether a substantial federal question existed was resolved in Judge Wicks' decision.

volves a substantial federal question. Such a determination, not being automatic, presupposes that the court has jurisdiction to decide the controversy even though it may, after due consideration, choose to surrender temporarily its power to decide. Inasmuch as *Stratton* has made it clear that only a three-judge district court has the requisite jurisdiction to decide a complaint seeking injunctive relief from acts sought to be justified by reliance upon a state statute because the statute, so applied, is repugnant to the federal constitution [3] we are of the opinion that the determination of whether a federal court ought to abstain is a determination that may only be made in the first instance by a three-judge district court.[4]

Stratton v. St. Louis S. W. Ry., supra, is undeniable authority for the proposition that no appeal may be preferred to a court of appeals from an action taken by a district judge upon an application to convene a three-judge district court unless there first was jurisdiction in the district court over the subject matter ruled upon. Having decided that Judge Bicks had no jurisdiction to proceed as he did, we must conclude from *Stratton* that we have no jurisdiction to entertain an appeal from his decision. To be sure, this result leaves us in a somewhat anomalous position. A court of appeals as a matter of course entertains appeals that claim a lack of jurisdiction in a district court and a court of appeals so importuned has jurisdiction to determine whether the district court's powers, so challenged, were exercised within district court jurisdiction. Anomalous as our position is, we feel bound by the Supreme Court's opinion in *Stratton*, an opinion which that Court has never seen fit to reverse, and to which it

[3] Accord, *Oneby v. United States*, 316 U. S. 480 (1942).

[4] See *Alabama Public Service Comm'n v. Southern Ry.*, 341 U. S. 341, 350 (1951). Contra, *Chicago, Duluth & Georgian Bay Transit Co. v. Nims*, 252 F. 2d 317 at 320 (6th Cir. 1958).

has given its approval when construing a companion section, 28 U. S. C. §2282. *Ex Parte Cogdell*, 342 U. S. 163 (1951).

In *Bell* v. *Waterfront Commission of New York Harbor*, *supra*, we first found that the district court could determine the preliminary question of whether there was a substantial federal question to be adjudicated upon, and therefore the court of appeals had jurisdiction to review that preliminary determination. Though the result we reach here of denying to a one-judge district court, and to ourselves, the power similarly to determine a jurisdictional question, the jurisdictional question itself is a quite dissimilar one,[5] and in determining the issue before us we are constrained to follow *Stratton*. Therefore, since we are of the opinion that a three-judge district court should have been convened, it is our duty to grant the motion to dismiss. Accord, *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 252 F. 2d 317, 319 (6 Cir. 1958).

II—*The Order of Judge Dimock*

Falsone v. *United States*, 205 F. 2d 734 (5 Cir.), *cert. denied*, 346 U. S. 864 (1953), held that the denial of a motion to quash a subpoena of an administrative agency, unconnected with litigation, is a final order and therefore appealable. In *In Re Albert Lindley Lee Memorial Hospital*, 209 F. 2d 122 (2 Cir. 1953), *cert. denied sub nom. Cincotta* v. *United States*, 347 U. S. 960 (1954), this court expressly followed the *Falsone* case. There would appear, therefore, under ordinary circumstances to be no doubt as to the appealability of an order denying a motion to quash. However, the order before us on appeal was sought below

5 See *Board of Supervisors* v. *Laird*, 207 F. 2d 807 (5 Cir. 1953), judgment vacated on other grounds and cause remanded, 347 U. S. 971 (1954).

on the ground that the issuance of the subpoena was repugnant to the federal constitution. In such a situation 28 U. S. C. §2281 requires that a three-judge district court be convened if a substantial federal question exists. *Bell* v. *Waterfront Commission of New York Harbor, supra.* Therefore, though the issue is a different one from the one before Judge Bicks, in considering whether we may entertain the purported appeal we must hold that inasmuch as Judge Dimock exercised power properly exercisable only by a three-judge district court we have no jurisdiction to hear an appeal from his order. This result is required under the *Stratton* doctrine.

The refusal by Judge Dimock to request that a three-judge district court be convened is, of course, subject to the same infirmity that Judge Bicks' refusal was. This order was but a reaffirmation of the earlier decision.

Also, the stay pending appeal granted by Judge Dimock is not an appealable order. It enjoined state activities allegedly repugnant to the federal constitution, and such an injunction was properly issuable only by a three-judge district court.

The results we reach are unhappy ones. We are refusing access to our court to a party who we believe is entitled to relief. However, as we understand *Stratton*, the Supreme Court has determined that we are not the proper tribunal to adjudicate the issues raised by the purported appeals.

Appeals dismissed.

LUMBARD, *Chief Judge* (dissenting):

Agreeing with my brethren that the orders made by Judges Bicks and Dimock are of the sort which are ordinarily appealable,[1] I would deny the motion to dismiss and would hear the appeals to decide first whether the single district judges had jurisdiction to act as they did and then proceed, if it is found that they did have jurisdiction, to consider the merits.

The appellees argue here, and my brethren agree with them, that even if these orders are appealable in form, no review of the merits may be made by this court. Since an injunction restraining the enforcement of a state statute on the ground that it violates the federal Constitution may be issued only by a three-judge court, 28 U. S. C. §2281, the appellees contend that the single district judge had no jurisdiction to entertain the application, and that this lack of jurisdiction may be attacked only by way of mandamus in the Supreme Court. The appellees, who thus find themselves in the odd posture of urging upon this court lack of jurisdiction in the district court in order to preserve for their benefit the very order which they claim was entered without jurisdiction, cite dictum in *Stratton v. St. Louis S. W. Ry.*, 282 U. S. 10 (1930), in support of their position.[2]

1. See, in addition to the *Glen Oaks Utilities* case cited in the majority opinion, *N.A.A.C.P. v. Bennett*, 360 U. S. 471 (1959), where, on appeal from an order of a three-judge court retaining jurisdiction, the Supreme Court considered the merits without discussing the issue of appealability.

2. "If a single judge, thus acting without jurisdiction, undertakes to enter an order granting an interlocutory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this Court, as the statute plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirement. Nor does an appeal

It is clear beyond any doubt that if a district judge, without entering an appealable order, rules that he, sitting alone, will hear a request for an injunction restraining the enforcement of a state statute, the appropriate remedy for a party requesting a three-judge court is by writ of mandamus in the Supreme Court. E.g., *Ex parte Bransford*, 310 U. S. 354 (1940); see Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, 360 (1951 ed.) and authorities there cited. A court of appeals would not then have appellate jurisdiction under 28 U. S. C. §§1291, 1292. Nor would it be proper for a court of appeals itself to enter a writ of mandamus since the courts of appeal have no appellate jurisdiction over cases decided by three-judge district courts and could not, therefore, satisfy the requirement of 28 U. S. C. §1651 that such writs may issue only "in aid of their * * * jurisdictions." See *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, 25 (1943).

In this case, however, the district court has proceeded to enter orders which meet the standards for appellate review prescribed by 28 U. S. C. §§1291, 1292. The appellees urge that nonetheless this court should dismiss the appeals for lack of jurisdiction and leave the appellant with its remedy of mandamus in the Supreme Court. If, in fact, the district judges exceeded their jurisdiction in

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lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this Court.

"Accordingly, where a court of three judges should have been convened, and was not, this Court may issue a writ of mandamus to vacate the order or decree entered by the District Judge and directing him, or such other judge as may entertain the proceeding, to call to his aid two other judges for the hearing and determination of the application for an interlocutory injunction." 282 U. S. 15-16.

entering the orders before us on appeal, we would surely be barred from considering the merits underlying their decisions. 28 U. S. C. 1253 directs that in "any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges" an appeal may be taken from a denial of an interlocutory or permanent injunction directly to the Supreme Court. But I think we have the jurisdiction and the statutory obligation to hear this appeal and first decide whether the orders did exceed the jurisdiction of district judges sitting alone in the district court, and whether the suit was of the kind which should have been presented to a district court of three judges. *Diggs* v. *Pennsylvania Public Utilities Comm'n*, 180 F. 2d 623, 629 (3d Cir. 1950).

If we hold that Judge Bicks was required to impanel a three-judge court, we must vacate his order and that of Judge Dimock for lack of jurisdiction, and we can go no further. *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 266 F. 2d 427, 433 (3d Cir. 1959); *Board of Supervisors* v. *Turcaud*, 207 F. 2d 807 (5th Cir. 1953). But see *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 252 F. 2d 317 (6th Cir. 1958); *Waddell* v. *Chicago Land Clearance Comm'n*, 206 F. 2d 748 (7th Cir. 1953). If, on the other hand, we hold that the issues before the district judges were not for a three-judge court either because the challenge to the state statute was not of the type comprehended by 28 U. S. C. 2281 or because the question of "equitable abstention" is analogous to the threshold jurisdictional determination of a substantial federal question, which is to be decided by the single district judge and reviewed by the court of appeals, *Bell* v. *Waterfront Comm'n*, 279 F. 2d 853 (2d Cir. 1960), we should proceed to the merits as we would in any other case in which the jurisdiction of a district judge is attacked and is upheld. Cf. *Quirin* v. *United States*, 121 F. 2d 631 (4th Cir. 1941),

vacated on other grounds, 316 U. S. 486 (1942); *Capital Service, Inc.* v. *United States District Court*, 198 F. 2d 18 (9th Cir. 1952).

Jurisdictional questions are surely not beyond the scope of this court's authority. We are often called upon to decide whether diversity jurisdiction was properly exercised by a district court, although in deciding that it was not we must vacate the decision below and oust ourselves of jurisdiction to go any further. Underlying the majority's opinion is the assumption that matters which should be considered only by a three-judge court and by the Supreme Court should not be presented to this court—that supervision over three-judge panels should rest with the Supreme Court only. But even when the issue is whether a case was one as to which original jurisdiction lay exclusively with the Supreme Court, courts of appeal have passed on the jurisdictional issue after a final order was entered and have not required the parties to seek relief by way of mandamus in the Supreme Court. See *United States* v. *State of Washington*, 233 F. 2d 811 (9th Cir. 1956); *Farnsworth* v. *Sanford*, 115 F. 2d 375 (5th Cir. 1940), *cert. denied*, 313 U. S. 586 (1941).

If we were now to decide the jurisdictional question the Supreme Court could, of course, review our determination on certiorari or even by a writ of mandamus. The majority's view, however, imposes on the federal courts a procedure of piecemeal review whereby a court of appeals is always forced to stay its hand whenever an appellant or appellee argues to it that the decision below should have been made by a three-judge court. No matter how worthless such a claim may be, we would not be able to dispose of it on an appeal from a final order but would have to await a decision on a petition for mandamus in the Supreme Court. Only after the Supreme Court decided the jurisdictional question might we be permitted to

consider the merits, and the merits would not be ripe for Supreme Court review until we had passed upon them on remand. I cannot believe that the authority of the Supreme Court over three-judge tribunals was intended to extend so far as to preclude us from deciding the jurisdictional issue when a district judge enters an order that is otherwise appealable under 28 U. S. C. §§1291, 1292, and thereby to impose on the parties a procedure calling for separate appellate consideration of the jurisdictional and substantive questions.

It is true that the dictum in the *Stratton* case, *supra*, appears to indicate that even after an appealable order is entered by the district court, the only means of vacating it is by mandamus in the Supreme Court. But it seems to me that the Supreme Court in *Stratton* was concerned with the effects of appellate review of the *merits* of an unauthorized order entered by a single district judge and did not proscribe ordinary review of matters going to the *jurisdiction* of the single district judge if his order is otherwise appealable. See Hart & Wechsler, The Federal Courts and the Federal System 853 (1953).

For these reasons I would deny the motion to dismiss.

Judgment Dated April 14, 1961

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of April, one thousand nine hundred and sixty-one.

Present:

Hon. J. EDWARD LUMBARD, Chief Judge,
Hon. J. WARREN MADDEN, Judge, Court of Claims
Hon. STERRY R. WATERMAN, Circuit Judge.

Motions having been made herein by counsel for the appellees to dismiss the appeals of November 4, 1960 and December 28, 1960, for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that said motions be and they hereby are granted and that the appeals from orders of the United States District Court for the Southern District of New York be and they hereby are dismissed.

Order to Show Cause Issued April 18, 1961 in the United States District Court for the Southern District of New York by Hon. John M. Cashin

Upon the annexed affidavit of Charles H. Tuttle, verified April 18, 1961, upon the complaint herein and the exhibits annexed thereto, upon the opinion and order of the Honorable Alexander Bicks herein, dated November 4, 1960, the opinion and order of the Honorable Edward J. Dimock herein, dated December 28, 1960 and January 4, 1961, respectively, the opinion of the United States Court of Appeals for the Second Circuit herein, dated April 14, 1961, and upon all the papers heretofore filed and all the proceedings heretofore had herein,

And it appearing to the Court that (1) the actions heretofore threatened and attempted by the defendants against the plaintiff are subject to grave doubt as to their legality under the Constitution and Laws of the United States, (2) such actions, if taken by the defendants in accordance with their threats so to do, would result in irreparable injury to the plaintiff, (3) there are good and sufficient reasons to bring on this motion by order to show cause, and (4) due notice of the hearing on this order to show cause may be given to the Governor and Attorney General of the State of New York,

Let the defendants, and each of them, show cause before this Court at Room 506, United States Courthouse, Foley Square, New York, N. Y., at 10:00 a.m. on the 25th day of April, 1961, or as soon thereafter as counsel can be heard, why an order should not be entered:

(1) Convening a District Court of three judges pursuant to 28 U.S.C. §2281 for the hearing of this cause and

Order to Show Cause Issued April 18, 1961 in the United States District Court for the Southern District of New York by Hon. John M. Cashin

of the plaintiff's motion for an injunction, both preliminary and permanent, and granting the plaintiff's request, hereby made, that the Chief Judge of the United States Court of Appeals for the Second Circuit be notified, pursuant to 28 U.S.C. §2284, of the presentation of this application for an injunction in order that the necessary designation of three judges for said Court may be made;

(2) Restraining and enjoining the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them from enforcing or attempting to enforce against the plaintiff the provisions of the Alcoholic Beverage Control Laws of the State of New York, particularly Section 3(28), Section 62, Section 100(1) and (2), Section 17(7) and (10) thereof, pending the hearing of the plaintiff's motion, hereby made, for an injunction, both preliminary and permanent, so restraining the defendants by a District Court of three judges;

(3) Restraining and enjoining the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business pending the hearing of the plaintiff's motion, hereby made, for an injunction, both preliminary and permanent, so restraining the defendants by a District Court of three judges; and it is

ORDERED, that personal service of this order to show cause and the papers on which it is based upon the Honorable Louis Lefkowitz, Attorney-General of the State of New York, attorney for the defendants, on or before the 19th

Order to Show Cause Issued April 18, 1961 in the United States District Court for the Southern District at New York by Hon. John M. Cashin

day of April, 1961 at 5:00 p.m. shall constitute good and sufficient service of this order to show cause, and it is further

ORDERED that notice of the hearing on this order to show cause be given by mailing a copy thereof by registered mail to the Governor and the Attorney-General of the State of New York at least five (5) days prior to April 25, 1961, the date of the hearing on this order to show cause; and it is further

ORDERED, that the defendants' opposing papers be served on the plaintiff's attorneys by April 24, 1961 at 10:00 a.m.

Dated: New York, N. Y., April 18, 1961.

JOHN M. CASHIN
U. S. D. J.

Affidavit of Charles H. Tuttle in Support of Plaintiff's Application

State of New York, }
County of New York, } ss.:

CHARLES H. TUTTLE, being duly sworn, says:

I am counsel for the plaintiff.

Nature of this Application

1. I make this affidavit in support of the plaintiff's application by order to show cause (1) for the convening of a three-judge District Court pursuant to 28 U. S. C. §§2281 and 2284 to hear and determine this action and the plaintiff's motion for an injunction, both preliminary and permanent, and (2) for an order restraining the defendants, being the Chairman, Members and Commissioners, respectively of the New York State Liquor Authority, (a) from enforcing against the plaintiff the provisions of the Alcoholic Beverage Control Law of the State of New York, and (b) from hindering, harassing or interfering with the plaintiff or the plaintiff's business, pending the hearing by a District Court of three judges on the plaintiff's application for a preliminary injunction so restraining the defendants *pendente lite*.

The Recent Decision of the United States Court of Appeals

2. This application is made pursuant to the decision of the U. S. Court of Appeals for the Second Circuit herein, dated April 14, 1961 (Exhibit A hereto) dismissing the plaintiff's appeals from the decisions and orders of Judge Bicks and Judge Dimock, and holding (p. 1444) that "a

three-judge district court should have been convened", as sought by the plaintiff to hear and determine the plaintiff's application for the relief here again requested.

3. The Court of Appeals also stated (p. 1445) that this plaintiff "is entitled to relief".

Nature and History of this Case

4. The history of this case, including the decisions and orders of Judge Bicks and Judge Dimock, is set forth in full in the Appendix to Appellant's Brief in the U. S. Court of Appeals (Exhibit B hereto). The plaintiff's position as to the applicable law is set forth in its Appellant's Brief in U. S. Court of Appeals (Exhibit C hereto). Accordingly, I shall merely undertake to summarize the nature and history of this case to date.

5. The plaintiff, a New York corporation, is engaged in selling bottled liquor exclusively for export to overseas passengers emplaning for foreign countries at Idlewild Airport. Its business is conducted under comprehensive regulation by the U. S. Bureau of Customs.

6. The State Liquor Authority, however, determined that the plaintiff's business "is in conflict with the Laws of the State of New York and, therefore, will be illegal."

7. The result was to dry up the plaintiff's source of supplies in New York State. As Judge Bicks found (Appellant's Appendix 53a, 188 F. Supp. at p. 436):

> "The New York Importers & Distillers Association circularized its members advising that in view of the position of the Attorney General and of 62 of the Alcoholic Beverage Control Law, they could not

> legally fill plaintiff's orders. Plaintiff has not since been able to make purchases to meet its requirements and faces the prospect of closing its doors, with consequent substantial damage."

8. Accordingly, the plaintiff instituted this action for a declaratory judgment, with appropriate injunctive relief, that the provisions of the New York Alcoholic Beverage Control Law, as the defendants seek to apply it to the plaintiff's export business, are unconstitutional under (i) the Commerce Clause (ii) the clause prohibiting a State from laying imposts or duties on imports and exports without the consent of Congress and (iii) the Supremacy clause of the Constitution of the United States.

9. The complaint also alleges that the Tariff Act of 1930, 19 U. S. C. §1311, and the regulations thereunder, together with the applicable provisions of the Internal Revenue Code, 26 U. S. C. §§5521 and 5522, constitute a comprehensive, exclusive and preemptive scheme adopted by Congress for the regulation and promotion of foreign commerce in, and export of, bonded wines and liquors.

10. Judge Bicks, in his decision and order of November 4, 1960 (Appellant's Appendix 51a-57a, 188 F. Supp. 434), refused the plaintiff's initial request for the convening of a three-judge District Court and for a temporary injunction, —the very relief here sought. Instead, Judge Bicks held that the plaintiff should be required to resort to the New York State courts in the first instance, but he retained jurisdiction of this case with leave to the plaintiff to renew its application for the relief here sought "after the state court has ruled".

Affidavit of Charles H. Tuttle in Support of Application

11. The U. S. Court of Appeals, however, citing *Stratton* v. *St. Louis S.W. Ry.*, 282 U. S. 10, held (pp. 1442, 1443, 1444):

> "* * * we are of the opinion that the determination of whether a federal court ought to abstain is a determination that may only be made in the first instance by a three-judge district court.
>
> * * *
>
> "Having decided that Judge Bicks had no jurisdiction to proceed as he did, we must conclude from *Stratton* that we have no jurisdiction to entertain an appeal from his decision.
>
> * * *
>
> "Therefore, since we are of the opinion that a three-judge district court should have been convened, it is our duty to grant the motion to dismiss."

12. In the *Stratton* case, thus cited by the Court of Appeals as determinative in this case, the Supreme Court held (282 U. S. at p. 18) that although the remedy by mandamus to require the convening of a three-judge District Court was still available,

> "It is not necessary, however, that formal application should be made for such a writ, as the District Judge may now proceed to take the action which the writ, if issued, would require."

13. Thus the Court of Appeals has now held that the plaintiff is entitled to have a three-judge District Court convened in this case, and the Supreme Court in the *Stratton* case has held that a formal application to it for mandamus is "not necessary * * * as the District Judge may now proceed to take the action which the writ, if issued, would require".

Affidavit of Charles H. Tuttle in Support of Application

14. The Appellant's Brief in the Court of Appeals fully sets forth the reasons why in the plaintiff's view, the three-judge District Court should exercise,—not abdicate, its statutory jurisdiction to hear and determine this case. Accordingly, I shall not repeat those reasons here.

15. After the plaintiff appealed from Judge Bicks' decision, the State Liquor Authority retaliated by attempting to choke off the plaintiff's life-line of supply from out-of-State sources to which the plaintiff had been driven because its New York suppliers had been frightened off by the defendants' prior determination of illegality.

16. This effort to drive the plaintiff out of business before it could obtain a federal adjudication of its federal rights was attempted first under color of State law by an administrative *subpoena duces tecum* directed to the plaintiff and admittedly designed to ascertain the identity of the plaintiff's suppliers and truckers (Appendix to Appellant's Brief 84a-85a).

17. When they were temporarily restrained by Judge MacMahon's order to show cause from proceeding pursuant to the subpoena, however, the defendants resorted to overt threats to the several U. S. Customs bonded interstate truckers who had been making deliveries to the plaintiff (Appendix to Appellant's Brief 59a-60a, 78a, 80a-83a).

18. The plaintiff's applications for injunctive relief against such overt harassment and interference came on before Judge Dimock who rendered a decision and order granting a stay restraining the defendants from such activity pending the plaintiff's appeal. Judge Dimock, however, denied the plaintiff's motion for a similar injunction

pendente lite, for the empanelling of a three-judge District Court and for an order quashing the *subpoena duces tecum*.

19. The Court of Appeals dismissed the plaintiff's appeal from Judge Dimock's denials of the relief it sought holding (p. 1444) that since "a substantial federal question exists * * * Judge Dimock exercised power exercisable only by a three-judge district court". The Court of Appeals added (p. 1445):

> "Also, the stay pending appeal granted by Judge Dimock is not an appealable order. It enjoined state activities allegedly repugnant to the federal constitution, and such an injunction was properly issuable only by a three-judge district court."

20. The Court of Appeals concluded (p. 1445):

> "The results we reach are unhappy ones. We are refusing access to our court to *a party who we believe is entitled to relief*." (Emphasis added.)

21. The plaintiff now seeks the relief to which the Court of Appeals, in the plaintiff's view, has said it is entitled. Plaintiff's reasons for believing that it is entitled to such relief are set forth in the Appellant's Brief in the Court of Appeals (pp. 38-43) and need not be repeated here.

There Are "Good And Sufficient Reasons" For Proceeding Here By Order To Show Cause

22. Although the Court of Appeals held (p. 1445) that "the stay pending appeal granted by Judge Dimock * * * was properly issuable only by a three-judge district court," the Clerk of the Court of Appeals has advised my office

that Judge Dimock's stay remains in effect until April 29, 1961, when the mandate will issue fifteen days after the decision of the Court of Appeals on April 14, 1961. (Rule 28(b) of the U. S. Court of Appeals for the Second Circuit).

23. Under new Rule 9(c)(2) of this Court ten days' notice of motion is required for an application of this character unless there are "good and sufficient reasons" for resorting to an order to show cause.

24. Under Rule 9(o)(2), however, motions requesting relief of the type here sought are to be heard on Tuesdays "unless the judge assigned to the Motion Part otherwise directs."

25. Accordingly, the first Tuesday for which this application could be brought on for hearing on ten days' notice would be May 2, 1961,—three days after the issuance of the mandate of the Court of Appeals and the consequent expiration of Judge Dimock's stay restraining the defendants from harassment or interference with the plaintiff or its business.

26. Accordingly, the plaintiff's past experience furnishes "good and sufficient reasons" for resorting to an order to show cause here so that this application for an appropriate stay continuing and amplifying the stay granted by Judge Dimock, may be heard and determined by this Court before Judge Dimock's stay expires.

27. The one week notice will provide ample time to give the statutory five days' notice of the hearing to the Governor and the Attorney-General of the State of New York as required by 28 U. S. C. §2284(2).

28. Furthermore, one week should provide ample time for the Attorney-General of the State of New York, who represents the defendants here and is fully familiar with every step of this case, to formulate his position on this application. Accordingly, since Rule 9(c)(2) of this Court contemplates service of answering papers three days before the return day, the order to show cause provides for service of the defendants' papers one day prior to the hearing.

29. No previous application has been made for the relief herein sought except to the extent stated above.

WHEREFORE, I respectfully submit that the plaintiff is plainly entitled under the decision of the Court of Appeals to the convening of a three-judge District Court and to the interim relief here requested. Accordingly, I respectfully request that this order to show cause issue as prayed.

(Sworn to by Charles H. Tuttle on April 18, 1961.)

Restraining Order Issued by Judge Cashin on April 25, 1961

The plaintiff having moved by order to show cause dated April 18, 1961, for an order convening a District Court of three judges pursuant to 28 U. S. C. §2281 for the hearing of this cause and for a injunction, both preliminary and permanent, restraining the defendants from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business, and for other relief, and said motions having duly come on to be heard before me on April 25, 1961; and Kelly & Schwartz, attorneys for plaintiff by Charles H. Tuttle, Esq., having appeared in support thereof, and Louis J. Lefkowitz, Esq., attorney for defendants, by Philip Watson, Esq., having appeared in opposition thereto;

Now, on reading and filing plaintiff's aforesaid application by order to show cause issued by Honorable John M. Cashin on April 18, 1961; and the affidavit of Charles H. Tuttle, verified April 18, 1961, together with the exhibits annexed thereto, in support of the said application, and after hearing argument by Charles H. Tuttle, Esq., in support of the said application and by Philip Watson, Esq., in opposition thereto, and it appearing to the Court that the plaintiff may be irreparably damaged unless the Court continues the temporary injunction heretofore granted by the Honorable Edward J. Dimock herein by order dated January 4, 1961 pending the determination of plaintiff's aforesaid application for the convening of a three-judge District Court, it is hereby

Ordered, that the plaintiff's motion for an order temporarily enjoining and restraining the defendants from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business pending the decision on the plaintiff's application for an order con-

vening a three-judge Court herein be, and the same hereby is, granted, and the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them are hereby enjoined and restrained from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business pending the determination of the aforesaid application, and it is further

ORDERED, that the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them, are hereby enjoined and restrained from communicating with respect to the plaintiff or the plaintiff's business with any of the plaintiff's suppliers whose names appear in any evidence or testimony which may be obtained from the plaintiff by the defendants; and it is further

ORDERED that the bond in the sum of $1,000, heretofore posted by the plaintiff pursuant to the order of the Honorable Edward J. Dimock herein, dated January 4, 1961, shall be proper security pursuant to Rule 65(c) of the Federal Rules of Civil Procedure.

Dated: New York, N. Y., April 25, 1961.

Signed at 5:15 P.M.
John M. Cashin
U. S. D. J.

JOHN M. CASHIN
U. S. D. J.

Opinion and Order of Judge Cashin in the United States District Court for the Southern District of New York

Appearances:

KELLY & SCHWARTZ, Esqs.,
Attorneys for Plaintiff
1780 Broadway, New York, N. Y.

Charles H. Tuttle, Esq.
John F. Kelly, Esq.
Stoddard B. Colby, Esq.
Stuart H. Johnson, Jr., Esq.
Of Counsel.

HON. LOUIS J. LEFKOWITZ,
Attorney General of the State of New York
Attorney for Defendants
80 Centre Street, New York, N. Y.

Philip Watson, Esq.
Assistant Attorney General
Of Counsel.

CASHIN, D. J.

This is a motion to impanel a three-judge district court pursuant to 28 U. S. C. §2281 brought on by an order to show cause. The plaintiff, a New York corporation, is engaged in selling bottled wines and liquors solely for export to overseas passengers from premises at Idlewild Airport. The defendants are the Chairman, Members and Commissioners of the New York State Liquor Authority.

The liquor sold by plaintiff is placed upon the passengers' planes for delivery only upon arrival at their foreign destinations. The liquor cannot be diverted for any purpose other than export from the United States. The United

States Treasury Department, Bureau of Customs, has approved plaintiff's procedures and has ruled that plaintiff's business constitutes the exportation of merchandise within the meaning of Section 311 of the Tariff Act of 1930, 19 U. S. C. §1311.

The United States Bureau of Customs has approved and supervises the plaintiff's premises. The liquors sold by plaintiff are purchased solely for export from vendors who withdrew the same from Class 6 United States Government bonded manufacturing and United States Customs bonded warehouses for re-warehousing at the United States Customs-controlled space in plaintiff's premises. Pursuant to the Internal Revenue Code, each bottle plaintiff withdraws is labeled "Bottled for export from the U. S. A.".

Plaintiff sought a ruling from the New York State Liquor Authority as to whether its conduct set forth above contravenes the New York State Alcoholic Beverage Control Law. The State Liquor Authority sought and obtained an opinion from the New York State Attorney General (See 1960, Op. Atty. Gen. June 30) which was to the effect that the plaintiff's business constituted a "sale" within the meaning of the Alcoholic Beverage Control Law, §3(28); that there is no provision of that law which would authorize a license for such sales, and that no person can sell alcoholic beverages within New York without a license. Thereafter, the New York Importers and Distillers Association circularized its members advising that in view of the position of the Attorney General and of §62 of the Alcoholic Beverage Control Law they could not legally fill plaintiff's orders.

This action was then instituted on July 22, 1960. The plaintiff urged at that time that the provisions of the New York State Alcoholic Beverage Control Law are uncon-

stitutional, as applied to plaintiff, under (i) the Commerce clause; (ii) the clause prohibiting a State from laying imposts or duties on imports and exports without the consent of Congress; and (iii) the Supremacy clause of the Constitution of the United States. Plaintiff argued at that time that the 1930 Tariff Act as amended, the regulations adopted thereunder, and the applicable provisions of the Internal Revenue Code, constituted a comprehensive, exclusive and preemptive scheme duly adopted by Congress for the regulation, encouragement and promotion of foreign commerce in bonded liquors.

Plaintiff sought declaratory judgment to that effect, injunctive relief, and moved for the impaneling of a three-judge district court pursuant to 28 U.S.C. §2281, 2284. Judge Bicks of this Court denied plaintiff's motion to impanel a three-judge district court until after a state court has ruled on the constitutional issues. (188 F. Supp. 434 (1960)). Plaintiff appealed Judge Bicks' decision and also moved before Judge Dimock of this Court for an injunction restraining defendants from interfering with plaintiff's business during the pendency of this action, and for other relief not germane to the present motion. Judge Dimock refused to grant a preliminary injunction because the request was a mere renewal of the motion made before Judge Bicks. He did, however, issue an injunction against harassment by defendants pending the appeal from the order of Judge Bicks. Thereafter, the plaintiff appealed from the orders of Judge Bicks and Judge Dimock to the Circuit Court of Appeals.

On April 14, 1961 the Court of Appeals handed down its decision (Idlewild Bon Voyage Liquor Corporation v. Rohan (2 Cir. April 14, 1961) —— F. 2d ——). It stated by way of dictum that a three-judge district court should have been convened. It held, however, that in light of

Stratton v. St. Louis S. W. Ry., 282 U.S. 10 (1930) it was without jurisdiction to hear the appeals and granted defendants' motion to dismiss them. It said that—

> "In Stratton the Court said that, * * *, the district judge to whom an application was made for injunctive relief from the state activity was required to convene a three-judge district court. The Court held that if he failed to do so and dismissed the application on its merits the proper remedy was a writ of mandamus from the Supreme Court (see e.g., Ex Parte Bransford, 310 U.S. 354 (1940)), for a Court of Appeals would have no jurisdiction over any matter properly entertainable by a three-judge district court."

As I construe the decision of our Circuit Court of Appeals it said that plaintiff's only remedy was by way of mandamus to the Supreme Court of the United States and, accordingly, dismissed the appeals because it had no jurisdiction to hear them. The mandate in this decision has not, as of this date, come down. It is true that the decision of the Circuit Court of Appeals did say that Judges Bicks and Dimock were in error and that a three-judge district court should have been appointed. However, I consider this as dictum. I consider Judge Bicks' and Judge Dimock's orders as still in full force and effect.

Thereafter, and on April 18, 1961, I signed an order directing defendants to show cause why an order should not be entered convening a three-judge district court pursuant to 28 U.S.C. §2281. Thus, I have before me the same issue on which Judge Bicks and Judge Dimock have already ruled. Their decisions are still the law of this case.

Plaintiff argues that on the basis of the dictum in the Court of Appeals decision dismissing the appeals from

Judges Bicks' and Dimock's decisions, I should now convene a three-judge district court. Defendants urge that plaintiff's motion should be denied because the issues are res judicata and that plaintiff's only remaining remedy in the United States courts is mandamus.

Whether or not I have the power to convene a three-judge district court at this time is questionable. In *In re Hines*, (2 Cir. 1937) 88 F. 2d 423, Judge Swan stated:

> "It is well established that a judge may not overrule the decision of another judge of co-ordinate jurisdiction made in the same case. The law enunciated by the first judge is not merely his individual opinion; it is the law of the District Court, to be followed, upon similar facts, until a different rule is laid down by a court of superior jurisdiction. • • • Such a rule is essential to an orderly and seemly administration of justice in a court composed of several judges."

However, it appears that this doctrine has been modified to some extent in *Dictograph Products Company v. Sonotone Corporation*, (2 Cir. 1956) 230 F. 2d 131, dismissed per stipulation 352 U.S. 883 (1956). (see also *Higgins v. California Prune & Apricot Grower*, (2 Cir. 1924) 3 F. 2d 896, 898; *First National Bank in Greenwich v. National Airlines, Inc.*, (2 Cir. April 6, 1961) ..... F. 2d .....). However, what was involved in these latter cases was either a non-appealable order or a ruling in the meantime by a higher court on the issue in question.

In the instant case the Court of Appeals, in its decision handed down on April 14, 1961, stated that—

> "Appellees' argument that this order was not final and hence unappealable under 28 U.S.C. §1291, 1292 is not well taken. No parallel state actions were pending and there was no state adjudication to await.

Opinion and Order of Judge Cashin in the United States District Court for the Southern District of New York

> There was nothing left to be done in the federal courts because the action there had been for all intents and purposes concluded. Appellant was effectively out of court—any action upon its prayer for injunctive relief was indefinitely postponed under these circumstances. There is no bar on this ground to appealability. See Glen Oaks Utilities, Inc. v. City of Houston, 280 F. 2d 330 (5 Cir. 1960)."

Although it is true that since Judge Bicks rendered his decision a higher court has spoken on the matter, that court had no jurisdiction over the subject matter and whatever it said on the matter was dictum.

Assuming, however, that I have the power to overrule Judge Bicks and Judge Dimock, I will not so exercise it. This is not a situation where plaintiff has no other remedy. Plaintiff has other courses open to it. The most obvious is to move before Judge Bicks for reargument in light of the Court of Appeals decision. (see Rule 34 of the General Rules of United States District Courts for the Southern and Eastern Districts of New York). The other remedy is a writ of mandamus. In *Stratton*, supra, the Supreme Court ruled that where a court of three judges should have been convened and was not, the remedy was a writ of mandamus vacating the order of the District Judge and directing him to covene a three-judge court. This view has been adhered to in later cases. (*Ex Parte Bransford*, 310 U.S. 354 (1940); *Ex Parte Cogdell*, 342 U.S. 163 (1951).

Instead of either of these courses, plaintiff has renewed its motion for the impaneling of a three-judge district court. Accordingly, the motion for the appointment of a three-judge court is denied.

It is so ordered.

Dated: New York, N. Y.
May 3rd, 1961.

JOHN M. CASHIN
United States District Judge

Order to Show Cause for a Stay Pending Application for Review to the Supreme Court in the United States Court of Appeals for the Second Circuit

Upon the annexed affidavit of Charles H. Tuttle, verified May 5, 1961, upon the decision of this Court dated April 14, 1961, upon the opinion and order of Honorable John M. Cashin herein, dated May 3, 1961, and upon all the papers heretofore filed and all the proceedings heretofore had herein,

And it appearing to the Court that (1) the actions heretofore threatened and taken by the defendants-appellees against the plaintiff-appellant are subject to grave doubt as to their legality under the Constitution and Laws of the United States; (2) such actions, if taken by the defendants-appellees in accordance with their threats so to do, would result in irreparable injury to the plaintiff-appellant; and (3) there are good and sufficient reasons to bring on this application by order to show cause,

LET the defendants-appellees, and each of them, show cause before this Court on the ..... day of May, 1961 why an order should not be entered

(1) Staying defendants-appellees, their officers, agents, servants, employees, attorneys and all persons acting in concert with them from enforcing or attempting to enforce against the plaintiff-appellant the provisions of the Alcoholic Beverage Control Law of the State of New York, especially Section 3(28), Section 22, Section 100(1) and (2), Section 17(7) and (10) thereof, pending the making and determination of the plaintiff-appellant's petition for certiorari in the Supreme Court of the United States to review the decision of this Court dated April 14, 1961 and the plaintiff-appellant's motion in the Supreme Court of the United States for leave to file a petition for a writ of mandamus directed to the Honorable Alexander Bicks,

Order to Show Cause for a Stay Pending Application for Review to the Supreme Court in the United States Court of Appeals for the Second Circuit

Honorable Edward J. Dimock and Honorable John M. Cashin and the United States District Court for the Southern District of New York; and

(2) Staying the defendants-appellees, their officers, agents, servants, employees, attorneys and all persons acting in concert with them from taking any action to hinder, harass or in any manner interfere with the plaintiff-appellant or the plaintiff-appellant's business pending the making and determination by the United States Supreme Court of the plaintiff-appellant's petition for a writ of certiorari and motion for leave to file a petition for a writ of mandamus as aforesaid; and it is

ORDERED that the defendants-appellees, their officers, agents, servants, employees, attorneys and all persons acting in concert with them be, and they hereby are, stayed from enforcing or attempting to enforce against the plaintiff-appellant the provisions of the Alcoholic Beverage Control Law of the State of New York as aforesaid, pending the determination of this application, and it is further

ORDERED that the defendants-appellees, their officers, agents, servants, employees, attorneys and all persons acting in concert with them be, and they hereby are, stayed from taking any action to hinder, harass, or in any manner interfere with the plaintiff-appellant pending the determination of this application; and it is further

ORDERED that personal service of this order to show cause and the papers on which it is based upon the Honorable Louis Lefkowitz, Attorney-General of the State of New York, attorney for the defendants-appellees, on or before the day of May, 1961 at M. shall constitute good and sufficient service of this order to show cause.

Dated: New York, N. Y., May , 1961.

U. S. C. J.

Endorsement on Order to Show Cause

The hearing of the within motion has been set for Monday, May 8, 1961 at 10:30 a.m., in room 1705, U. S. Court House, Foley Square, New York 7, New York. In the meanwhile, counsel for all parties will be expected to see to it that the status quo in the action is maintained.

May 5, 1961

A. Daniel Fusaro,
Clerk
by Niall F. O'Doherty, Chief Deputy Clerk.

Affidavit of Charles H. Tuttle in Support of Idlewild's Application

State of New York,
County of New York, } ss.:

CHARLES H. TUTTLE, being duly sworn, deposes and says:

I am counsel for the plaintiff-appellant, Idlewild Bon Voyage Liquor Corporation (hereafter called "Idlewild").

Nature of the Stays Sought

1. I make this application in support of Idlewild's application by order to show cause, for a stay to preserve the *status quo*, as Judge Dimock and Judge Cashin have done heretofore, and to prevent the defendants-appellees (hereafter called "the appellees") from driving Idlewild out of business with consequent irreparable injury.

2. The stay is sought pending the making and determination of (a) Idlewild's petition for certiorari in the Supreme Court of the United States to review the decision of this Court dated April 14, 1961, and (b) Idlewild's motion in the Supreme Court for leave to file a petition for a writ of mandamus directed to Judges Bicks, Dimock and Cashin and the United States District Court for the Southern District.

3. The stays here sought would restrain the appellees from enforcing or attempting to enforce the provisions of the Alcoholic Beverage Control Law of the State of New York against Idlewild and from taking any steps to hinder, harass or interfere with Idlewild or Idlewild's business,

pending the making and determination of the aforesaid petition for certiorari and motion for leave to file a petition for a writ of mandamus.

Judge Cashin's Decision Voiding Idlewild's Attempt To Proceed In Accordance With This Court's Decision.

4. This Court's recent decision of April 14, 1961 records Idlewild's seemingly interminable quest for the relief to which this Court there said Idlewild is "entitled" (p. 1445).

5. Idlewild promptly sought to comply with this Court's decision by moving in the U. S. District Court for the Southern District of New York, on an order to show cause issued on April 18, 1961 by the Honorable John M. Cashin, for the convening of a three-judge District Court and for an injunction, both preliminary and permanent.

6. Judge Cashin granted an interim stay preserving the *status quo*, substantially in the form previously granted by Judge Dimock (Appendix to Appellant's Brief 96a-97a), pending his decision on Idlewild's application.

7. On May 3, 1961, however, Judge Cashin denied Idlewild's application to convene a three-judge District Court with an opinion which is annexed as Exhibit A.

8. Judge Cashin's opinion characterizes as "dictum" the holding of this Court that (p. 1444) "a three-judge district court should have been convened" by Judge Bicks and Judge Dimock, and the express holding of this Court (p. 1443) that because they acted without jurisdiction, "we have no jurisdiction to entertain an appeal",—the precise *ratio decidendi* which caused this Court to dismiss Idlewild's appeal.

9. Instead, Judge Cashin felt constrained to follow as "the law of the case" the very refusals by Judge Bicks and Judge Dimock to convene a three-judge District Court which this Court has just held were without jurisdiction, and as to which this Court explicitly said (p. 1445):

> "The results we reach are unhappy ones. We are refusing access to our court to a party who we believe is entitled to relief."

10. Judge Cashin suggested that Idlewild might move for reargument before Judge Bicks or petition the United States Supreme Court for a writ of mandamus.

11. Application to Judge Bicks for reargument is highly uncertain because (a) the ten-day interval therefor has long since expired (General Rule 9(m) of the U. S. District Court for the Southern District of New York); (b) Rule 34 cited by Judge Cashin seemingly is confined to a remand for further proceedings; and (c) unhappily Judge Bicks is in the hospital, as I am informed, for serious surgery.

12. Accordingly, the last remaining remedy for Idlewild's substantial federal rights appears to be an application to the Supreme Court of the United States for a certiorari and/or a writ of mandamus.

13. If the stay here sought is granted, I will undertake to prosecute these applications to the Supreme Court with the greatest possible vigor and dispatch. If this application should be denied, however, Idlewild's resort to the Supreme Court would be rendered moot, for in the absence of a stay, the appellees would be free to pursue their previous course designed to put Idlewild out of business forthwith.

Irreparable Injury To Idlewild Will Result Unless The Stay Here Sought Is Granted.

14. At every stage of Idlewild's long, and so far fruitless, quest for a remedy to protect its substantial federal rights, it has been necessary to seek successive stays by order to show cause because the appellees have been unwilling to agree to a moratorium in their unrelenting struggle to exterminate Idlewild.

15. This action was made necessary because the appellees' determination that Idlewild's business is "illegal" had dried up Idlewild's sources of supply in New York State, and Idlewild was threatened with "the prospect of closing its doors" as Judge Bicks found (188 F. Supp. at p. 436).

16. When Idlewild sought to appeal Judge Bicks' decision, the appellees instantly retaliated and attempted to choke off Idlewild's out-of-state sources of supply, first under color of law and then by overt threats to Idlewild's truckers. For this reason, Judge Dimock granted an injunction pending Idlewild's appeal to this Court against attempts by the appellees to hinder, harass or in any manner interfere with Idlewild or its business (Appendix to Appellant's Brief 93a-94a, 96a-97a).

17. After this Court's decision of April 14, 1961, Judge Cashin continued Judge Dimock's stay in effect pending his decision, thereby again preserving the *status quo*.

18. Now, however, Judge Cashin's stay has expired. By this application Idlewild merely seeks to preserve the *status quo* pending its resort to the United States Supreme Court.

19. Accordingly, unless the stay here sought is granted, Idlewild will be hounded out of business by the appellees, and its substantial federal rights will be destroyed before Idlewild has had its day in the federal court to which it is entitled by statute and by the express statement of this Court.

20. This application by order to show cause is necessary because Mr. Watson, counsel for the appellees, candidly advised my associate, Stuart H. Johnson, Jr. over the telephone yesterday that the appellees would not even consent to a brief moratorium to permit Idlewild to apply by motion for the stay here sought.

21. Except as stated above, no previous application has been made for the relief here sought.

22. Accordingly, I respectfully request that the stay here sought be granted, together with such other and further relief as may be just.

(Sworn to by Charles H. Tuttle on May 5, 1961.)

Stay Order of Court of Appeals, Dated May 8, 1961

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of May, one thousand nine hundred and sixty-one.

Present:

Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH, Circuit Judges,
Hon. HARRY E. WATKINS, District Judge.

A motion having been made herein by counsel for the appellant for a stay pending application for writ of certiorari to the Supreme Court of the United States, and for other and further relief,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is referred to the panel of this court which dismissed the appeal.

Further ordered that a stay of all proceedings shall continue until Wednesday, May 10, 1961, with leave to seek a further stay.

Stay Order of Court of Appeals, Dated May 10, 1961

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of May, one thousand nine hundred and sixty-one.

Present:

Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH, Circuit Judges,
Hon. HARRY E. WATKINS, District Judge.

A motion having been made herein by counsel for the appellant for the continuance of a stay heretofore granted by the court,

Upon consideration thereof, it is

Ordered that the stay heretofore granted on Monday, May 10, 1961, be and it hereby is extended pending disposition of the motion for a stay.

Petitioner's Notice of Alternative Application for an Order Recalling and Amending the Mandate of the Court of Appeals for the Second Circuit

SIR:

PLEASE TAKE NOTICE that in connection with the plaintiff-appellant's pending application for a stay, the plaintiff-appellant will move in the alternative, pursuant to the request in its moving papers for such other and further relief as may be just, for an order recalling and clarifying the mandate of this Court, and amending the said mandate so as expressly to vacate the decisions and orders of Honorable Alexander Bicks and Honorable Edward J. Dimock herein for lack of jurisdiction and as nullities and/or remanding the case to the United States District Court for the Southern District of New York for further proceedings in conformity with the decision of this Court dated April 14, 1961.

Dated: New York, New York
May 9, 1961

KELLY & SCHWARTZ
Attorneys for Plaintiff-Appellant

To:

HONORABLE LOUIS J. LEFKOWITZ
Attorney General of the State of New York

Injunction Order of the United States Court of Appeals for the Second Circuit, Dated May 15, 1961

INJUNCTION ORDER

WHEREAS on April 14, 1961 this Honorable Court dismissed for lack of jurisdiction a purported appeal preferred to it in the within cause; and WHEREAS by application presented to this Court on May 8, 1961 appellant is desirous of having this decision reviewed by the Supreme Court of the United States and has prayed for other relief, and is desirous of having the parties left in the same position that they were in at the time the appeal was taken until a reasonable time has elapsed within which the petition for mandamus and/or certiorari may be prepared and filed,

NOW, THEREFORE, IT IS HEREBY ORDERED That for a period of thirty days from the day of this order, and for no longer time, the defendants-appellees, their officers, agents, servants, employees, attorneys and all persons acting in concert with them, are enjoined from enforcing or attempting to enforce against the plaintiff-appellant the provisions of the Alcoholic Beverage Control Law of the State of New York, especially Section 3(28), Section 22, Section 100(1) and (2), Section 17(7) and (10) thereof, pending the making and filing of the plaintiff-appellant's petition for mandamus and/or certiorari in the Supreme Court of the United States to review the decision of this Court dated April 14, 1961; and

The defendants-appellees, their officers, agents, servants, employees, attorneys and all persons acting in concert with them, are further enjoined for said thirty days from taking any action to hinder, harass or in any manner interfere with the plaintiff-appellant or the plaintiff-appellant's business pending the making and filing in the United States Supreme Court of the plaintiff-appellant's petition for a writ of mandamus and/or certiorari.

And in all other respects plaintiff-appellant's prayers for relief are denied.

J. EDWARD LUMBARD
STERRY R. WATERMAN
U. S. C. JJ.
J. WARREN MADDEN
Judge, U. S. Court of Claim

May 15, 1961

Federal Statutes and Regulations

(a) 28 U.S.C. §2281 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

(b) 28 U.S.C. §2284 provides in pertinent part:

"In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

• • •

"(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent

irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted."

(c) 28 U.S.C. §1337 provides in pertinent part:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce * * *."

(d) 28 U.S.C. §1331(a) provides:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

(e) 28 U.S.C. §1291 provides in pertinent part:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * *. * * * except where a direct review may be had in the Supreme Court."

(f) 28 U.S.C. §1292(a) provides in pertinent part:

"(a) The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, * * * refusing * * * injunctions, * * * except where a direct review may be had in the Supreme Court."

Federal Statutes and Regulations

(g) 28 U.S.C. §2106 provides:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."

(h) Section 311 of the Tariff Act of 1930, 19 U.S.C. §1311 is printed at pp. 17a-20a of the Petitioner's Appendix.

(i) Pertinent provisions of the Internal Revenue Code:

"PART III—MANUFACTURING BONDED WAREHOUSES

26 U.S.C. §5521. Establishment and operation.

(a) Establishment.—All medicines, preparations, compositions, perfumery, cosmetics, cordials, and other liquors manufactured wholly or in part of domestic spirits, intended for exportation, as provided by law, in order to be manufactured and sold or removed, without being charged with duty and without having a stamp affixed thereto, shall, under such regulations as the Secretary or his delegate may prescribe, be made and manufactured in warehouses similarly constructed to those known and designated in Treasury regulations as bonded warehouses, class six: *Provided*, That such manufacturer shall first give satisfactory bonds to the Secretary or his delegate for the faithful observance of all the provisions of law and the regulations as aforesaid, in amount not less than half of that required by the regulations of the Secretary or his delegate from persons allowed bonded warehouses.

(b) Supervision.—All labor performed and services rendered under this section shall be under the supervision of an officer of the customs, and at the expense of the manufacturer.

(c) Materials for manufacture.—

(1) Exportable free of tax.—Any manufacturer of the articles specified in subsection (a), or of any of them, having such bonded warehouse, shall be at liberty, under such regulations as the Secretary or his delegate may prescribe, to convey therein any materials to be used in such manufacture which are allowed by the provisions of law to be exported free from tax or duty, as well as the necessary materials, implements, packages, vessels, brands, and labels for the preparation, putting up, and export of such manufactured articles; and every article so used shall be exempt from the payment of stamp and excise duty by such manufacturer. Articles and materials so to be used may be transferred from any bonded warehouse under such regulations as the Secretary or his delegate may prescribe, into any bonded warehouse in which such manufacture may be conducted, and may be used in such manufacture, and when so used shall be exempt from stamp and excise duty; and the receipt of the officer in charge shall be received as a voucher for the manufacture of such articles.

(2) Imported materials.—Any materials imported into the United States may, under such regulations as the Secretary or his delegate may prescribe, and under the direction of the proper officer, be removed in original packages from on shipboard, or from the bonded warehouse in which the same may be, into the bonded warehouse in which such manufacture may be carried on, for the purpose of being used in such manufacture,

without payment of duties thereon, and may there be used in such manufacture. No article so removed, nor any article manufactured in said bonded warehouse, shall be taken therefrom except for exportation, under the direction of the proper officer having charge thereof, whose certificate, describing the articles by their mark or otherwise, the quantity, the date of importation, and name of vessel, with such additional particulars as may from time to time be required, shall be received by the collector of customs in cancellation of the bond, or return of the amount of foreign import duties.

(d) Removals.—

(1) In general.—Such goods, when manufactured in such warehouses, may be removed for exportation under the direction of the proper officer having charge thereof, who shall be designated by the Secretary or his delegate, without being charged with duty and without having a stamp affixed thereto.

(2) Transportation for export.—Any article manufactured in a bonded warehouse established under subsection (a) may be removed therefrom for transportation to a customs bonded warehouse at any port, for the purpose only of being exported therefrom, under such regulations and on the execution of such bonds or other security as the Secretary or his delegate may prescribe.

26 U.S.C. §5522. Withdrawal of distilled spirits to manufacturing bonded warehouses.

(a) Authorization.—Under such regulations and requirements as to stamps, bonds, and other security as shall be prescribed by the Secretary or his delegate, any manufacturer of medicines, preparations, composi-

tions, perfumeries, cosmetics, cordials, and other liquors, for export, manufacturing the same in a duly constituted manufacturing warehouse, shall be authorized to withdraw, from any internal revenue bonded warehouse, so much distilled spirits as he may require for such purpose, without the payment of the internal revenue tax thereon.

(b) Allowance for loss or leakage.—Section 5011(a) (relating to distilled spirits lost or destroyed in bond) shall apply to spirits withdrawn for transportation to manufacturing bonded warehouses under subsection (a).

26 U.S.C. §5523. Special provisions relating to distilled spirits and wines rectified in manufacturing bonded warehouses.

Distilled spirits and wines which are rectified in manufacturing bonded warehouses, class six, and distilled spirits which are reduced in proof and bottled or packaged in such warehouses, shall be deemed to have been manufactured within the meaning of section 311 of the Tariff Act of 1930 (19 U.S.C. 1311), and may be withdrawn as provided in such section, and likewise for shipment in bond to Puerto Rico, subject to the provisions of such section, and under such regulations as the Secretary or his delegate may prescribe, there to be withdrawn for consumption or be rewarehoused and subsequently withdrawn for consumption: *Provided*, That no internal revenue tax shall be imposed on distilled spirits and wines rectified in class six warehouses if such distilled spirits and wines are exported or shipped in accordance with such section, and that no person rectifying distilled spirits or wines in such warehouses shall be subject by reason of such rectification to the payment of special tax as a rectifier."

Pertinent Federal Regulations of the United States Treasury Department, Bureau of Customs

TITLE 19 CODE OF FEDERAL REGULATIONS—CUSTOMS DUTIES

PART 18—TRANSPORTATION IN BOND AND MERCHANDISE IN TRANSIT

General Provisions

§18.1 Carriers; application to bond.

(a) Merchandise to be transported from one port to another in the United States in bond, except as provided for in paragraph (b) of this section, shall be delivered to a common carrier bonded for that purpose, but such merchandise may be transported with the use of the facilities of other bonded or nonbonded carriers. For the purpose of this section, the term "common carrier" means a common carrier of merchandise owning or operating a railroad, steamship, or other transportation line or route or a freight forwarder as defined in section 402 of part IV of the Interstate Commerce Act, as amended (49 U.S.C. 1002(a)(5).

(b) Pursuant to Public Resolution 108, of June 19, 1936, and subject to compliance with all other applicable provisions of this part, the collector of customs at New York, upon the request of the party in interest, may permit merchandise entered and examined for customs purposes to be transported in bond between the ports named in the resolution by bonded cartmen or lightermen duly qualified in accordance with the provisions of Part 21 of this chapter, if the collector is satisfied that the transportation of such merchandise in this manner will not endanger the revenue.

(c) A common carrier desiring to receive merchandise for transportation in bond shall file with the collector of customs a bond on customs Form 3587 in a sum to be rec-

ommended by the collector, accompanied by the fee of $35 prescribed by §24.12 of this chapter, a certified extract of its charter showing that it is authorized to engage in common carriage, and a statement that it is operating or intends to operate as a common carrier and that it undertakes to carry for such as choose to employ it and does not limit its carriage to specific individuals or firms. In addition to the foregoing a freight forwarder shall submit a certificate issued by the Interstate Commerce Commission showing that it is operating as a freight forwarder as defined in section 402 of part IV of the Interstate Commerce Act. The extract and statement need not be submitted in the case of railroad or steamship companies generally known to be engaged in common carriage.

(d) In the case of motor carrier bonds submitted for consideration, the following shall be filed in addition to the requirements mentioned above:

(1) A detailed description of the equipment to be used, showing whether the trucks are open or closed and whether they can be secured with customs seals, the number of trucks operated, and whether such trucks are owned or leased by the proposed bonded motor carrier, and, if leased, whether the trucks are operated by employees of the lessee or lessor.

(2) A list of the lines or routes over which the principal operates or will operate, setting out the cities or towns at which the trucks stop or lay over en route and where and in whose custody the trucks remain during such stops or layovers.

(3) A definite statement as to whether the principal transports merchandise according to schedule over each of

the lines or routes named or performs carriage only when a shipment is secured for transportation.

(4) A detailed description of the terminal facilities employed by the principal at the points of origin and destination shown on the list of lines or routes.

(5) A statement showing that facilities are available for the segregation and safeguarding of the packages designated by the collector for examination from a particular shipment until such packages are called for by the public store cartman and removed to the public stores for examination.

(e) Canadian and Mexican common carriers by motor vehicles may be bonded for the transportation of merchandise between two ports in Canada or Mexico through the United States. (See §5.11 of this chapter.)

(f) Common carrier bonds may be discontinued at any time by the Bureau or the collector of customs at the headquarters port where the bond is filed. Bonded carriers desiring to discontinue such bonds shall make application therefor to such collector.

§18.2 Receipt by carrier; manifest.

(a) When merchandise is delivered to a bonded carrier for transportation in bond, the carrier's receipt shall be given immediately to the lading inspector on the customs in-bond manifest covering the merchandise. The merchandise shall be laden on the conveyance under the supervision of a customs officer, unless the transporting conveyance is not to be sealed with customs seals or the lading inspector accepts the check of the carrier as to the merchandise laden thereon.

Pertinent Federal Regulations of the United States Treasury Department, Bureau of Customs

(b) A manifest, customs Form 7512, containing a description of the merchandise shall be prepared by the carrier or shipper and signed by the agent of the carrier. Except as prescribed in §5.11 of this chapter, relating to merchandise in transit through the United States between ports in contiguous foreign territory, a separate set shall be prepared for each entry and, if the consignment is contained in more than one conveyance, a separate set shall be prepared for each conveyance.

(c) The manifest shall be filed in duplicate and, after the goods have been laden and the carrier has receipted all copies, one copy shall be delivered to the conductor, master, or person in charge to accompany the conveyance and be delivered to the collector at destination for his record. An extra copy of customs Form 7512 may be required for use as a permit to the inspector or customs warehouse officer at the point where the merchandise is to be laden. When a copy of the carrier's manifest is lost or cannot be produced, a copy shall be made of whichever manifest is available.

§18.3 Transshipment; transfer by bonded cartman.

(a) When bonded merchandise in one conveyance is to be transshipped under customs supervision to another single conveyance while en route to the port of destination or departure from the United States, the copy of the manifest on customs Form 7512 accompanying the merchandise to each such place of transshipment shall be surrendered to the collector of customs at that place for execution of a certificate of transfer thereon and for return to the carrier to accompany the merchandise to such port of destination or departure.

Pertinent Federal Regulations of the United States Treasury Department, Bureau of Customs

(b) When bonded merchandise is to be transshipped in accordance with paragraph (a) of this section into more than one conveyance, there shall be prepared by the carrier, agent of the shipper, or forwarder for each such conveyance on each transshipment one additional copy of the carrier's manifest on customs Form 7512 which accompanies the merchandise to that place. The Form 7512 which accompanies the shipment to the place of transshipment shall be surrendered to the collector of customs there. After the execution by the customs officer supervising the transshipment of a certificate of transfer on each such additional copy, it shall be delivered to the conductor, master, or person in charge of the conveyance in which the merchandise is forwarded, for delivery to the collector of customs at the port of destination or departure from the United States for his record.

(c) If it becomes necessary at any point in transit to remove the customs seals from a conveyance containing bonded merchandise for the purpose of transferring its contents to another conveyance or to gain access to the shipment because of casualty or other good reason, and it cannot be done under customs supervision because of the element of time involved or because there is no customs officer stationed at such point, a responsible agent of the carrier may remove the seals, supervise the transfer or handling of the merchandise, seal the conveyance in which the shipment goes forward, and make appropriate notation on the conductor's or master's copy of the manifest of his action, including the date, serial number of the new seals applied, and the reason therefor. This authorization shall not apply in any case not involving a real emergency.

(d) All transfers to or from the conveyance or warehouse of merchandise undergoing transportation in bond

shall be made under the provisions of Part 21 and at the expense of the parties in interest, unless the carrier's bond is liable for the safekeeping and delivery of the merchandise while it is being transferred.

§18.4 Sealing conveyances and compartments; labeling packages; warning cars.

(a) Conveyances or compartments in which bonded merchandise is transported shall be sealed with red in-bond customs seals (except as otherwise provided for by §5.11(b) of this chapter) under customs supervision, except that when the compartment or conveyance cannot be effectively sealed, as in the case of merchandise shipped in open cars or barges, or on the decks of vessels, or when it is known that any seals would necessarily be removed outside the jurisdiction of the United States for the purpose of discharging or taking on cargo, or when it is known that the breaking of the seals will be necessary to ventilate the hatches, or in other similar circumstances, such sealing may be waived with the consent of the carrier and an appropriate notation of such waiver shall be made on the manifest. The Commissioner of Customs may authorize the waiver of sealing of conveyances or compartments in which bonded merchandise is transported in other cases when in his opinion the sealing thereof is unnecessary to protect the revenue or to prevent violations of the customs laws and regulations.

(b) Ports at which the facilities are insufficient to maintain continuous customs supervision over vessels arriving with bonded cargo while the bonded merchandise is not under customs seals shall permit the vessels to proceed to

destination without further sealing and notation to this effect shall be made on the manifest.

(c) Merchandise not under bond may be transported in sealed conveyances or compartments containing bonded goods when destined for the same place or places beyond, but not when intended for intermediate places.

(d) The seals to be used in sealing conveyances, compartments, or packages are prescribed by the Department and may be obtained in accordance with §24.13 of this chapter.

(e) Except as otherwise provided for in this paragraph, packages shipped in bond or by a carrier permitted to transport articles under the last sentence of section 553 of the tariff act, as amended, shall be corded and sealed or, in lieu thereof, the carriers shall furnish and attach to each such package a warning label on bright red paper, not less than 5 by 8 inches in size, containing the following legend in black type of a conspicuous size:

U. S. CUSTOMS

Transportation Entry No.
From To
This package is under bond and must be delivered intact to the chief officer of the customs at

WARNING

Two years' imprisonment or $5,000 fine or both, is the penalty for unlawful removal of this package or any of its contents.

Such cording and sealing or labeling of the packages so shipped is not required either when the packages are transported in a conveyance or compartment sealed with customs seals, or when the sealing of the conveyance or compartment in which the packages are transported is waived under paragraph (a) or (b) of this section. When the packages are shipped in a railroad car the sealing of which is practicable but which is not sealed because merchandise not being transported in bond is or may be carried in the same car, the packages being transported in bond shall be corded and sealed or labeled.

(f) The warning label, when used, shall be pasted securely on the package under customs supervision as close as practicable to the mark or number on the package. Additional labels may be required by the collector in such places on the package as he shall specify in any case where he is of the opinion that one is not adequate.

(g) When, in the case of crates and similar packages, it is impossible to attach the warning labels by pasting, bright red shipping tags of convenient size, large enough to be conspicuous and containing the same legend as the labels, shall be used in lieu of labels. Such tags shall be wired or otherwise securely fastened to the packages in such manner as not to injure the merchandise.

(h) Bonded carriers shall furnish and securely attach to the side doors of cars, to the doors of compartments, and on vehicles carrying bonded merchandise which are secured with customs seals, bright red cards, 8 by 10¼ inches in size, which shall be attached near such seals and on which shall be printed in large, clear, black letters the following:

Pertinent Federal Regulations of the United States Treasury Department, Bureau of Customs

United States Customs. Two years' imprisonment, or $5,000 fine, or both, is the penalty for the unlawful removal of United States customs seals on this car, vehicle, or compartment. United States customs officers only are authorized to break these seals.

Car or vessel
Number or name
From
To

NOTICE: The merchandise in this car, vehicle or compartment shall be delivered to the chief officer of the customs at

§18.5 Diversion

(a) Collectors of customs at ports of first arrival may permit merchandise forwarded under any class of transportation entry to be diverted to any other port than the port named in the entry upon application of the consignee or agent. An application to divert made under this section shall be furnished in the number of copies required for the purposes of local administration.

(b) The collector at an intermediate port may permit merchandise in transit under bond under any class of transportation entry to be entered at his port for consumption, warehouse, exportation, further transportation in bond, or under any bond provision of the tariff laws.

(c) Merchandise received at the port of original destination under any class of transportation entry may be forwarded to another port or returned to the port of origin

on the same transportation entry, unless the merchandise has been placed in general order in which case a new transportation entry shall be required.

(d) If it is desirable to split a shipment at a port of destination and to enter a portion for consumption or warehouse and forwarded the balance in bond, or to divert the entire shipment or a part thereof to more than one port, the collector at the port where such diversion takes place shall complete the original transaction, notify the port of origin, and require the filing of a new transportation entry or entries for the portion or portions forwarded.

* * * * *

§18.7 Lading for exportation, verification of.

(a) When merchandise (including baggage) covered by an entry or withdrawal for transportation and exportation is delivered to the exporting carrier at the port of destination, the delivering carrier's copy of the in-bond manifest shall be promptly delivered to the customs lading officer.

(b) The collector shall require only such supervision of the lading for exportation of merchandise covered by an entry or withdrawal for exportation or for transportation and exportation as is reasonably necessary to satisfy him that the merchandise has been laden on the exporting conveyance.

(c) Whenever the circumstances warrant, and occasionally in any event, collectors shall request the Customs Agency Service to check export entries and withdrawals against the records of the exporting carriers. Such check or verification shall include an examination of the carrier's records of claims and settlement of export freight charges, and any other records which may relate to the transaction.

Pertinent Federal Regulations of the United States Treasury Department, Bureau of Customs

§18.8 Liability of carrier for shortage, irregular delivery, or nondelivery; penalties.

(a) The initial bonded carrier shall be responsible for shortage, irregular delivery or nondelivery at destination or port of exit of bonded merchandise, re-received by it for carriage. When sealing is waived, any loss found to exist at destination shall be presumed to have occurred while the merchandise was in the possession of the carrier, unless conclusive evidence to the contrary is produced.

(b) Penalties imposed as liquidated damages under the common carrier's bond for shortage, failure to deliver, or irregular delivery shall be as follows:

(1) In the case of shortage, failure to deliver, or delivery direct to the consignee or other person of any merchandise free of duty, an amount equal to the value of the missing merchandise, not to exceed in any one shipment the sum of $25.

(2) In the case of shortages or failure to deliver merchandise subject to duty, an amount equal to the duties on the missing merchandise or, if the duties cannot be estimated promptly, an amount equal to 70 per centum of the value shown on the manifest.

(3) In the case of unauthorized delivery directly to the consignee or other person of merchandise subject to duty, an amount equal to one and one-quarter times the estimated duty thereon, or, if the duties cannot be estimated promptly, an amount equal to 70 per centum of the value shown on the manifest.

(c) In addition to the penalties described in paragraph (b) of this section, the carrier shall pay any internal-reve-

nue taxes or other taxes accruing to the United States on the missing merchandise, together with all costs, charges, and expenses caused by the failure to make the required transportation, report, and delivery.

(d) In any case in which liquidated damages imposed in accordance with this section do not aggregate over $20,000 and the collector is satisfied by evidence submitted to him with an application for relief from the payment thereof that any shortage, irregular delivery, nondelivery, or any failure to obtain customs supervision was without any intent to evade any law or regulation, the collector may cancel such claim upon the payment of any lesser amount or without the payment of any amount, as he may deem appropriate under the law and in view of the circumstances.

§18.9 Examination by inspectors of trunk line associations or agents of the Interstate Commerce Commission.

(a) Upon presentation of proper credentials showing the applicant to be a representative of the Trunk Line Association, the Interstate Commerce Commission, the Joint Rate Inspection Bureau of Chicago, or the Southern Weighing and Inspection Bureau of Atlanta, inspectors of customs in charge shall permit such applicant to open and examine packages containing in-bond merchandise described in the manifest in general terms for the purpose of ascertaining whether the merchandise is properly classified under the interstate commerce laws.

(b) The opening and examination of such packages shall be without expense to the Customs Service or the owner of the goods and shall be done in the presence of a customs officer. The contents of the cases shall not be

removed or disturbed further than is necessary to ascertain the character thereof. The customs officer shall require the packages to be securely closed, and shall note on the manifest the packages so inspected, the date, and by whom inspected.

§18.10 Kinds of entry.

(a) The following entries and withdrawals may be made for merchandise to be transported in bond:

(1) Entry for immediate transportation without appraisement.

(2) Warehouse or rewarehouse withdrawal for transportation.

(3) Warehouse or rewarehouse withdrawal for exportation or for transportation and exportation.

(4) Entry for transportation and exportation.

(5) Entry for exportation.

(b) The permit copy of each entry or withdrawal made in any of the classes named in paragraph (a) of this section which is retained in the office of the forwarding collector shall be signed by the party making the entry or withdrawal. In the case of shipments to the Virgin Islands (U. S.) under paragraph (a)(3), (4) or (5) of this section, one additional copy of the entry or withdrawal on customs Form 7512 shall be filed and shall be mailed by the receiving collector to the collector of customs, Charlotte Amalie, St. Thomas, Virgin Islands (U. S.).

Pertinent Federal Regulations of the United States Treasury Department, Bureau of Customs

§18.10a Special manifest.

Merchandise for which no other type of bonded movement is appropriate may be shipped in bond from one port to another when such shipment is authorized by the collector of customs having custody of the merchandise. For this purpose customs Form 7512 prepared in quadruplicate shall be used as a special manifest.

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WAREHOUSE AND REWAREHOUSE WITHDRAWALS FOR TRANSPORTATION

§18.16 Forms of withdrawal; time.

(a) Merchandise may be withdrawn from warehouse for transportation to another port of entry if withdrawal for consumption or exportation can be accomplished at the port of destination before the expiration of the warehousing period, including any lawful extension thereof. The withdrawal document in such a case shall be executed on customs Form 7512, seven copies of which shall be required at the port of origin. However, the collector at such port may require an extra copy or copies to be furnished for use in connection with the delivery of the merchandise to the bonded common carrier named in the withdrawal document. In the case of alcoholic beverages, two extra copies will be required for use in furnishing the duty statement to the collector at destination. A person in whom the right to withdraw the merchandise to be so transported has not previously been vested in accordance with §8.39 of the chapter may make such withdrawal by (1) depositing a withdrawal for transportation on which is endorsed an

assent to the withdrawal by the person in whom the right of withdrawal is then vested and (2) filing with such endorsed withdrawal the bond provided for in §8.39(a) of this chapter.

(b) All withdrawals for transportation shall show the original warehouse entry number, date of entry, and the port at which filed, and shall name a consignee at the port of destination or exportation. When the withdrawal is made from a rewarehouse entry, the number and date of the rewarehouse entry, as well as the number and date of the original warehouse entry and the port at which the original warehouse entry was filed, shall be shown on such withdrawal. Each withdrawal for transportation shall contain the statement for withdrawals in §8.37(b) of this chapter.

§18.17 Withdrawal procedure

(a) Merchandise may be withdrawn for transportation prior to liquidation of the warehouse entry. In such cases the transportation entry, customs Form 7512, shall show any ascertained weight, gauge, or measure, the entered value of the particular merchandise covered by the withdrawal, and the estimated duty.

(b) All or any part of the merchandise covered by a warehouse entry may be withdrawn for transportation without deposit in a bonded warehouse and before liquidation, and may be permitted to remain on the vessel or other vehicle or on the pier in a constructive warehouse status pending examination and appraisement. When any such merchandise not deposited in warehouse is not forwarded under the withdrawal for transportation on account of damage or other cause, the importer shall be required to

withdraw such merchandise immediately for consumption or exportation, or designate a warehouse to which it may be sent, and, upon his failure to do so, it shall be treated as unclaimed.

(c) The duty on any samples withdrawn at the original port from a shipment covered by a withdrawal for transportation shall be collected at such port and a notation thereof made on the transportation entry. No separate invoice or extract from the original invoice shall be required to cover such samples.

§18.18 Forwarding procedure; procedure at destination

(a) The merchandise shall be forwarded in accordance with the general provisions for transportation in bond §§18.1-18.8.

(b) On arrival at destination, the merchandise may be entered for rewarehouse in accordance with §§8.33 and 8.34 of this chapter; for rewarehouse and withdrawal for consumption in accordance with §8.35 of this chapter; or for exportation in accordance with §8.36 of this chapter; or may be diverted to another port or returned to the port of origin in accordance with §18.5(c) and (d).

(c) The liquidation of the original warehouse entry shall be followed except in cases provided for in §16.3(c) or 16.10(h) of this chapter in cases involving shortage, irregular delivery, or nondelivery under the warehouse withdrawal for transportation, and in cases where the collector at destination is of the opinion that circumstances make it inadvisable to follow such liquidation. When the merchandise has been withdrawn for consumption prior to the receipt of the notice of liquidation from the original

port, differences of less than $3 between the estimated duty collected and the liquidated duty shall be disregarded. This procedure is likewise applicable to internal-revenue taxes.

Warehouse Withdrawals for Exportation or for Transportation and Exportation

§18.19 Procedure.

(a) Direct exportation. When merchandise is withdrawn from warehouse for direct exportation without transportation in bond to another port, an entry and manifest, customs Form 7512, shall be filed in quintuple. However, the collector may require an extra copy or copies to be furnished for use in connection with the delivery of the merchandise to the carrier named in the withdrawal document.

(b) Indirect exportation. (1) When merchandise is withdrawn from warehouse for transportation and exportation, seven copies of customs Form 7512 shall be required at the port of withdrawal. However, the collector may require an extra copy or copies to be furnished for use in connection with the delivery of the merchandise to be bonded common carrier named in the withdrawal document.

(2) The merchandise shall be forwarded in accordance with the general provisions for transportation in bond, §§18.1-18.8.

(3) If any part of a shipment is not exported or when a shipment is divided at the port of exportation, extracts in duplicate from the manifest on file in the customhouse

shall be made on customs Form 7512 for each part, one copy to be sent to the discharging inspector and the other to the landing inspector to be used as a report of exportation. The splitting up for exportation of shipments arriving under warehouse withdrawals for transportation and exportation shall be permitted only when various portions of a shipment are destined to different destinations, when the export vessel cannot properly accommodate the entire quantity, or in other similar circumstances. The provisions of §§18.23 and 18.24 shall also be followed in applicable cases.

(c) Withdrawal statement required. Each withdrawal for exportation or withdrawal for transportation and exportation shall contain the summary statement prescribed for withdrawals in §8.37(b) of this chapter.

• • • • •

PART 19—CUSTOMS WAREHOUSES AND CONTROL OF MERCHANDISE THEREIN

§19.1 Classes of customs warehouses.

(a) Customs warehouses shall be designated according to the following classifications:

• • • • •

(6) Class 6. Warehouses for the manufacture in bond, solely for exportation of articles made in whole or in part of imported materials or of materials subject to internal-revenue tax; and for the manufacture for home consumption or exportation of cigars in whole of tobacco imported from one country.

• • • • •

Pertinent Federal Regulations of the United States Treasury Department, Bureau of Customs

(c) When parts of buildings are used as customs bonded warehouses, the bonded and nonbonded portions thereof shall be effectively separated by partitions of substantial materials and construction erected in such a manner as to render it impossible to enter the premises in the absence of the customs warehouse officer without such violence as to make the entry easy of detection. So-called poultry wire, wood lattice or palings, plasterboard, beaverboard, or other materials of a light or flimsy nature, or materials of a substantial nature but which are insecurely installed are not acceptable for use as partitions. Where partitions consist of wire mesh or expanded metal panels, the wire shall be not less than No. 6 gauge (of a diameter of .192 inch) or equivalent cross sectional area with mesh openings not to exceed 2 inches in the larger dimension, and with the panel material riveted or welded into channel-iron or T-iron frames or secured with through hairpin bolts to 2 x 4 inch wood stud partition framing. Wood partitions shall be constructed of not less than 1-inch boards (dressed if desired) of uniform length between supports, nailed with not less than ten penny nails to not less than 2 x 4 inch stud framing and for additional security held in place by ⅛ x 1 inch metal cover-strips secured crosswise of the boards, preferably over the nailed ends, with carriage bolts through the boards and partition framing.

GENERAL PROVISIONS

§19.2 Application to bond; bond; renewal of.

(a) An owner or lessee desiring to establish a bonded warehouse shall make written application to the collector, describing the premises, giving their location, and stating the class of warehouse and shall transmit therewith the fee

of $50 prescribed by §24.12 of this chapter. Except in the case of a class 2 or class 7 warehouse, the application shall state whether the warehouse is to be operated only for the storage or treatment of merchandise belonging to the applicant or whether it is to be operated as a public bonded warehouse. If the warehouse is to be operated as a private bonded warehouse, the application shall also state the general character of the merchandise to be stored therein, with an estimate of the maximum duties and taxes which will be due on such merchandise at any one time. All storage warehouses operated by one proprietor in the same customs district may be included in one bond.

(b) The application shall be accompanied by a certificate signed by the president or secretary of a board of fire underwriters, and at ports where no such board exists by an officer or agent of each of two or more insurance companies, stating that the building is a suitable warehouse and acceptable for fire-insurance purposes. The application shall also be accompanied by a blueprint showing measurements, openings, etc., of the building or space to be bonded. If the warehouse to be bonded is a tank, the blueprint shall show all outlets, inlets, and pipe lines and shall be certified as correct by the proprietor of the tank. A gauge table showing the capacity of the tank in United States gallons per inch or fraction of an inch of height, certified by the proprietor to be correct, shall accompany the application. When a part or parts of a building are to be used as the warehouse, there shall be given a detailed description of the materials and construction of all partitions. When the proprietor is the lessee of the premises covered by the application and bond, he shall furnish a stipulation concurred in by the sureties, agreeing that, prior to the expiration of the lease covering the premises without re-

newal thereof, he will (1) transfer any merchandise remaining in the bonded warehouse to an approved bonded warehouse, (2) pay all duties, charges, or exactions due on such merchandise, or (3) otherwise dispose of such merchandise in accordance with the customs laws and regulations.

* * * * *

(d) On approval of the application to bond a proprietor's manufacturing warehouse, class 6, a bond shall be executed in duplicate on customs Form 3583. * * * All documents referred to in paragraph (b) of this section as may relate to proprietor's warehouse bonds, class 6 or 7, shall be submitted in duplicate.

(e) Any proprietor of a bonded warehouse may be required on 10 days' notice from the collector to furnish a new proprietor's warehouse bond; and if he fails to do so, no more goods shall be sent to the warehouse and those therein shall be removed at the expense of such proprietor. A new bond is required if the bonded warehouse is substantially altered or rebuilt.

§19.3 Bonded warehouses; alterations; suspensions; discontinuance.

(a) Alterations in bonded warehouses, class 6 or 7, may be made by permission of the collector, unless they constitute a material change in the premises, in which case the approval of the Bureau is required. All alterations to warehouses of class 2, 3, 4, 5, or 8, or combinations thereof, may be made by permission of the collector without approval of the Bureau.

(b) The use of all or part of a bonded warehouse or bonded floor or space may be temporarily suspended by the

collector on written application of the proprietor if there are no bonded goods in the area concerned. Upon the removal of all free goods, if any, the premises may again be used for the storage of bonded goods upon written application of the proprietor. In each case the collector of customs shall indicate his action by endorsement on the application. Rebonding will not be necessary.

(c) The Bureau may discontinue the bonded status of a warehouse at any time for reasonable cause. The collector may take similar action in the case of a warehouse of class 2, 3, 4, 5, or 8. When the proprietor desires to discontinue the bonded status of his warehouse, he shall make written application therefor to the collector. If the application is approved by the collector, he shall require all goods in such warehouse upon which the duty has not been paid to be transferred to another bonded warehouse without expense to the Government. The number of warehouses covered by a general bond may be reduced by discontinuance without necessitating a new bond unless the proprietor so desires.

§19.4 Offices; safety and sanitary requirements; supervision.

(a) Suitable accommodations for the customs warehouse officer shall be provided by the proprietor of the warehouse. An office for the accommodation of the warehouseman may be allowed in the bonded premises if separated by a partition from the space used for the storage of bonded goods.

(b) Fires shall not be permitted in any warehouse, other than warehouses of classes 6, 7 and 8, except in the office

of the customs warehouse officer and warehouseman. When lights are required, only safety lanterns or electric lights shall be used.

(c) All the doors and other entrances of bonded warehouses shall be secured by customs locks.

• • • • •

(e) The character and extent of the customs supervision to be exercised in connection with any warehouse or transaction provided for in this part shall be in accordance with §23.35 of this chapter.

• • • • •

§19.6 Permits; releases.

(a) Upon the receipt of a permit signed by the collector, or other customs officer designated for such purpose, the customs warehouse officer shall release the merchandising covered thereby to the warehouse proprietor, unless the proprietor furnishes a delivery order authorizing release to some other person, in which case the merchandise shall be released to the person designated by the proprietor. If the permit bears the endorsement provided for in §8.38 of this chapter, release in accordance with the foregoing shall be withheld, subject to the provisions of §20.3(e) of this chapter, pending the lodging of an order to release on customs Form 7505-B.

(b) Before delivery is permitted, the permit shall be endorsed to show that storage, cartage, labor, and other charges due the Government have been paid.

(c) Merchandise covered by a notice of lien filed by the carrier shall not be released until the lien has been satisfied or discharged.

Pertinent Federal Regulations of the United States Treasury Department, Bureau of Customs

§19.7 Expenses of labor and storage.

(a) All merchandise deposited in public stores or in bonded warehouses shall be held liable for the expenses of labor and storage chargeable thereon at the customary rates and for all other expenses accruing upon the goods.

(b) The rates of storage and labor shall be agreed upon between the importer and the warehouse proprietor, but in case of disagreement the collector may, with the consent of all parties in interest, determine the rates to be charged.

(c) Except in cases provided for by §8.28(c) of this chapter, when merchandise is stored in a public store under a warehouse entry, general order, or otherwise, the charges for storage due the Government shall be paid before the packages are delivered. The charges shall be based upon the existing bonded warehouse tariff of the port for storage and labor.

• • • • •

§19.9 Transfer to another warehouse.

(a) With the concurrence of the proprietors of the delivering and receiving warehouses, merchandise may be transferred under customs supervision and at the expense of the party requesting it from one bonded warehouse to another in the same port upon the written request of the importer or transferee to the collector, who shall issue an order for such transfer on customs Form 7500-A.

• • • • •

Pertinent Federal Regulations of the United States Treasury Department, Bureau of Customs

ACCOUNTS

§19.12 Certification of customs warehouse officer's reports. Before transmittal to the collector, the customs warehouse officer's report of merchandise received, delivered, released, withdrawn, or transferred shall be certified by the proprietor of the warehouse to be correct.

MANUFACTURING WAREHOUSES

§19.13 Requirements for establishment of warehouse.

(a) Buildings or parts of buildings and other enclosures may be designated as bonded manufacturing warehouses if the Bureau is satisfied that their location, construction, and arrangement afford adequate protection to the revenue. Such warehouses shall be used solely and exclusively for the purpose for which they are bonded. The general provisions pertaining to warehouses for the storage of bonded merchandise shall, so far as relevant, apply to bonded manufacturing warehouses.

(b) Application for the establishment of such a warehouse shall be made to the collector of customs for the port where the premises are situated, setting forth the size, construction, and location of the premises, the manufacture proposed to be carried on, and the kinds of materials intended to be stored and used therein.

(c) The procedure outlined in §19.2 with respect to the application to bond the premises and the execution of the bond shall be followed.

(d) A list of all articles intended to be manufactured in the warehouse shall be filed in duplicate with the collector of customs, who shall transmit one copy to the

Bureau. Such list shall set forth the specific names under which the articles are to be exported and under which they will be known to the trade, and shall show the names of all the ingredients entering into the manufacture of such articles, with the quantities of such ingredients or materials as may be dutiable or taxable.

(e) Proprietors of such warehouses are required to conform strictly to the formulas filed with the bond, or subsequently, and in no instance shall an article be permitted to be manufactured in or withdrawn from the warehouse which does not contain all the ingredients and in the quantities specified in the formula for the manufacture of such article, or which contains any ingredient not specified in the formula.

(f) Manufactured articles shall be marked with the trade name of the goods and may be marked, in addition, with the formulas and with such insignia or name as may be indicated or desired by the purchaser, if such additional marking will in no manner conflict with the requirements of the formula or present or create a false or misleading statement or impression.

(g) Each bonded manufacturing warehouse shall have a portion separated from the remainder of the premises and secured by customs locks to be used exclusively for the storage of all imported merchandise, domestic spirits, or other materials subject to internal-revenue tax transferred into such warehouse for manufacture. A like compartment shall be provided to be used exclusively for the storage of products manufactured in the warehouse. The premises shall be so secured as to prevent any person from having access thereto in the absence of the customs warehouse officer in charge, and the goods stored therein shall

be so arranged as to give all practicable convenience to such officer in making the required examination or taking samples for analysis.

§19.14 Materials for use in manufacturing warehouse.

(a) Imported merchandise to be used in a bonded manufacturing warehouse shall be entered on customs Form 7521 at the port at which such warehouse is located. Such form shall be prepared in quintuple. If the merchandise is not to be taken immediately to the manufacturing warehouse, a warehouse or rewarehouse entry, as the case may be, shall be made and customs Form 7521 used as a combined withdrawal and entry for manufacturing warehouse. If the merchandise has been imported or entered for warehouse at another port, it may be forwarded to the port at which the manufacturing warehouse is located under an immediate transportation without appraisement entry or warehouse withdrawal for transportation, whichever is applicable.

(b) Before the transfer of the merchandise to the manufacturing warehouse is permitted, a bond on customs Form 7571 in an amount equal to double the estimated duties shall be required unless a general bond on customs Form 3583 has been given.

(c) When the proprietor of any bonded manufacturing warehouse desires to receive therein any domestic merchandise, except merchandise subject to internal-revenue tax, to be used in connection with the manufacture of articles permitted to be manufactured in such warehouse, including packages, coverings, vessels, and labels used in putting up such articles, an application shall be executed in duplicate in the following form, one copy to be filed with the collector and the other with the customs warehouse officer in charge of the warehouse.

Pertinent Federal Regulations of the United States Treasury Department, Bureau of Customs

APPLICATION TO RECEIVE FREE MATERIALS

Port of

, 19

To the Collector of Customs:

Application is hereby made to receive into the bonded manufacturing warehouse known as , situated at , the following-described articles and materials:

Marks	Nos.	Description	Quantity	Value

(Signature)

;

Port of , 19

To the customs warehouse officer in charge of the bonded manufacturing warehouse specified above:

The above-described articles and materials are hereby permitted to be received into the warehouse in your charge, to be used therein in connection with the manufacture of articles as authorized by law.

Collector

Pertinent Federal Regulations of the United States Treasury Department, Bureau of Customs

(d) For the transfer of domestic spirits from an internal-revenue bonded warehouse to a bonded manufacturing warehouse, or for the transfer of domestic wines from internal-revenue bonded winery or bonded wine storeroom to a bonded manufacturing warehouse, a bond on customs Form 7571 shall be required unless the warehouse is covered by a bond on customs Form 3583.

§19.15 Withdrawal for exportation of articles manufactured in bond; waste or byproducts for consumption.

(a) Except cigars manufactured in bond and supplies for vessels, no articles or materials received into a bonded manufacturing warehouse or articles manufactured therefrom shall be withdrawn or removed therefrom except for direct exportation or transportation and exportation in bond to a foreign country. The exportation or shipment shall in every case be under the supervision of a customs officer.

(b) The coverings or containers of imported articles or materials, whether or not subject to duty apart from their contents, are not "articles or materials" within the meaning of section 311, Tariff Act of 1930, as amended, and need not be exported, but may be withdrawn from the warehouse for consumption under customs Form 7505 upon payment of the duties applicable to such coverings or containers in their condition as withdrawn.

(c) Labels, coverings, and empty containers imported to be used in putting up the manufactured articles, if subject to duty or tax, constitute "articles or materials" within the meaning of section 311, Tariff Act of 1930, as amended, but may be withdrawn for consumption upon payment of all applicable duties and taxes.

Pertinent Federal Regulations of the United States Treasury Department, Bureau of Customs

(d) When waste or a byproduct is withdrawn for consumption, customs Form 7505 shall be used, modified as necessary and describing in detail the waste or byproduct and the imported material from which it was produced. Such waste or byproduct shall be appraised at its wholesale value at the time of withdrawal in the principal markets of the country from which the material was imported, determined in accordance with the provisions of section 402, Tariff Act of 1930 as amended. Upon payment of the duty, the withdrawal permit shall be issued for delivery and a proper credit given upon the manufacturer's bond.

(e) Each withdrawal covering the items which are permitted to be withdrawn for consumption shall contain a summary statement thereon, showing for each class of merchandise the quantity on hand in the account, the quantity covered by the withdrawal presented, and the quantity remaining in the warehouse account, if any.

(f) The general procedure covering warehouse withdrawals for exportation shall be followed in the case of articles withdrawn for exportation from a bonded manufacturing warehouse, except that in the case of flour each copy of customs Form 7512 shall bear the following legend:

> Produced from wheat imported after September 15, 1930, without payment of duty thereon. Must not be exported to Cuba without permission from the collector at the port of withdrawal.

(g) Articles may be withdrawn for transportation and delivery to a bonded storage warehouse at an exterior port under the provisions of section 311, Tariff Act of 1930, as amended, for the sole purpose of immediate export or may be withdrawn pursuant to section 309(a) of the tariff act, as amended, or I. R. C. section 3451. Such withdrawal

Pertinent Federal Regulations of the United States Treasury Department, Bureau of Customs

shall be effected on customs Form 7512 as provided for in §18.16 of this chapter. A rewarehouse entry shall be made at the exterior port in accordance with §8.33 of this chapter supported by a bond on custom Form 7555 in an amount equal to the aggregate sum of double the estimated amount of ordinary customs duties on the merchandise (including any taxes imposed thereon which are required by law to be treated as duty imposed by the Tariff Act of 1930), plus the estimated amount of any other tax or taxes on the merchandise collectible by the collector of customs. The recital clause of such bond shall be modified to show that the merchandise is the product of a bonded manufacturing warehouse, class 6, and that it has been rewarehoused at the exterior port for the sole purpose of immediate export or withdrawal pursuant to section 309 (a) of the tariff act, as amended, or I. R. C. section 3451. The following new condition shall be added to the bond: "And if said articles shall be exported or withdrawn in accordance with the provisions of section 311 or 309 (a), Tariff Act of 1930, as amended, or in accordance with I. R. C. section 3451, in the manner prescribed by the regulations; or, in default thereof, if the obligors shall pay to the collector as liquidated damages an amount equal to the aggregate sum of double the duties assessable on such part of the shipment as shall not have been so exported or withdrawn, plus the amount of any internal-revenue tax assessable thereon:".

(h) No merchandise manufactured in a bonded manufacturing warehouse may be withdrawn by a person other than the manufacturer either from the manufacturing warehouse or from a warehouse where the merchandise is stored awaiting direct exportation, unless an authorization of the manufacturer is endorsed on the face of the withdrawal, or the manufacturer previously and in writing has transferred the right of withdrawal.

Pertinent Federal Regulations of the United States Treasury Department, Bureau of Customs

(i) When spirits and wines are withdrawn for shipment to Puerto Rico under section 311, Tariff Act of 1930, as amended, the procedure outlined in §7.1 of this chapter shall be followed.

(j) As proof of manufacture and exportation, the manufacturer shall file in the case of each transaction or period of manufacture a statement verified by the customs warehouse officer in charge of the warehouse, showing the date and number of the bond, the quantity and identity of the dutiable or taxable merchandise used, and the quantity and description of the articles into which it has been manufactured, together with the quantities of any byproducts and waste produced. In the case of articles manufactured with the use of distilled spirits, the statement shall also be verified by the foreman or chemist of the factory and shall show the number of packages of spirits used, the marks and numbers, the number of wine, proof and taxable gallons, and the degree of proof.

(k) The same proofs of exportation shall be required as in the case of other warehouse withdrawals for exportation.

(l) When the fact of exportation of all the products has been established by such proofs and any byproducts and waste have been exported or released for consumption, the bond given by the manufacturer, or the charges against his general bond, shall be canceled.

(m) Shortage, irregular delivery, and nondelivery occurring with respect to merchandise withdrawn from bonded manufacturing warehouse while it is under transportation in bond shall be charged against the bonded carrier.

Office-Supreme Court, U.S.
FILED
JUN 7 1961
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1960

SUPREME COURT, U. S.

No. 138

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,
Respondents.

PETITION FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 1220 MISC.

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

HONORABLE ALEXANDER BICKS, HONORABLE EDWARD J. DIMOCK, HONORABLE JOHN M. CASHIN, JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondents.

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

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Supreme Court of the United States

October Term, 1960

No. .....

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against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,
Respondents.

PETITION FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. .....

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

HONORABLE ALEXANDER BICKS, HONORABLE EDWARD J. DIMOCK, HONORABLE JOHN M. CASHIN, JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondents.

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

The Applications

Petitioner, Idlewild Bon Voyage Liquor Corporation, (hereafter called "Idlewild"), seeks a writ of certiorari to review the decision of a divided United States Court

of Appeals for the Second Circuit, rendered April 14, 1961, which dismissed its appeals from decisions by Judge Bicks and Judge Dimock; and to review so much of the Injunction Order of the Circuit Court of Appeals, dated May 15, 1961, as denied Idlewild's motion to recall and clarify the judgment of that Court so as to conform to its decision.

Furthermore, Idlewild hereby moves for leave to file a petition for a writ of mandamus directed to Honorable Alexander Bicks, Honorable Edward J. Dimock and Honorable John M. Cashin, Judges of the United States District Court for the Southern District of New York, requiring them to convene a district court of three judges and to grant Idlewild further appropriate relief.

These petitions for a writ of certiorari, and/or for a writ of mandamus, are presented together because they arise out of identical facts, but differing judicial views, on the important question of federal jurisdiction and procedure common to both petitions, namely: what is the appropriate forum to determine the admittedly "substantial" Federal constitutional and statutory rights of Idlewild, "a party who we believe is entitled to relief" (110a)* according to the Court of Appeals, in the face of immediate irreparable injury threatened by the New York State Liquor Authority.

Idlewild's complaint invoked its constitutional rights, its statutory rights, and such other relief as may be just and proper.

Reference to Opinions Below

Judge Bicks' initial decision of November 4, 1960 (49a) is reported at 188 F. Supp. 434.

Judge Dimock's subsequent opinion (88a) and order (93a) have not been officially reported.

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* All such references are to the pages of Petitioner's Appendix.

The majority and dissenting opinions of the Court of Appeals (103a, 111a) dismissing Idlewild's appeals from the decisions of Judge Bicks and Judge Dimock have not yet been officially reported. The judgment of the Court of Appeals is reprinted at 116a.

Judge Cashin's subsequent decision and order (130a) have not been officially reported.

The Injunction Order of the Court of Appeals, denying, *inter alia*, Idlewild's application for clarification of its judgment, is reprinted at 147a.

Jurisdictional Statement

The judgment of the Court of Appeals was entered on April 28, 1961, and the Injunction Order of the Court of Appeals, denying Idlewild's alternative application to recall and clarify its judgment, was entered on May 15, 1961.

The decisions of Judges Bicks, Dimock and Cashin,—all denying Idlewild's successive applications to convene a district court of three judges and for injunctive relief, were rendered on November 4, 1960, December 28, 1960 and May 3, 1961, respectively.

The jurisdiction of this Court is invoked on certiorari under 28 U. S. C. §1254(1) because the decision of a divided Circuit Court of Appeals presents important questions of federal constitutional and statutory law and jurisdiction, and, in our view, is in conflict with applicable decisions of this Court and other U. S. Courts of Appeal—questions which should now be definitively settled by this Court (Rule 19).

The jurisdiction of this Court to issue a writ of mandamus is invoked under 28 U. S. C. §1651(a). The application for mandamus is made pursuant to the holding of the majority of the Court of Appeals, on authority of *Stratton* v. *St. Louis S.W. Rwy. Co.*, 282 U. S. 10, that Idlewild's "proper remedy was a writ of mandamus from the Su-

preme Court" (106a) to review the refusals of Judge Bicks and Judge Dimock to convene a three-judge district court for a determination of the "substantial federal question" here presented by "a party who we believe is entitled to relief" (104a, 107a, 108a, 110a), and the subsequent holding by Judge Cashin that those refusals are "the law of the case" and Idlewild's remedy "is a writ of mandamus" (135a).

The Questions Presented

(1) Should a district court of three judges be convened, pursuant to 28 U. S. C. §§2281 and 2284, where the undenied allegations of Idlewild's complaint pose a "substantial federal question" as to the legality of attempted State regulation of exports contrary both to (a) the Foreign Commerce Clause, (b) the Export-Import Clause, and (c) the Supremacy Clause of the Constitution of the United States, and to the preemptive provisions of the Tariff Act of 1930, 19 U. S. C. §1311, together with the regulations thereunder (19 C. F. R. Parts 18 and 19) and associated provisions of the Federal Internal Revenue Code (26 U. S. C. §§5521 and 5522)?

(2) Does the Circuit Court of Appeals have jurisdiction over final and otherwise appealable orders under 28 U. S. C. §§1291 and 1292(a)(1) where, as here, single district judges, having original jurisdiction under 28 U. S. C. §§1337 and 1331, have denied Idlewild's applications for convening a three-judge district court, for enforcement of its statutory rights, and for injunctive relief against attempted regulation by the New York Liquor Authority of exports contrary to the uniform construction by the New York courts of the New York Alcoholic Beverage Control Law (*Ex Parte Bransford*, 310 U. S. 354, 361)?

(3) Should the Federal District Court abdicate its jurisdiction and deny Idlewild its statutory right (28 U. S. C. §§2281, 2284, 1331 and 1337) of access to the Federal District Court to vindicate its substantial Federal rights under the Federal Constitution, statutes and administrative regulations, despite imminent irreparable injury, where, as here,

(a) Idlewild is engaged solely in the business of exports pursuant to an exclusive and preemptive Federal program adopted by Congress pursuant to the Foreign Commerce, Export-Import and Supremacy Clauses of the Constitution of the United States;

(b) The Federal Tariff Act of 1930, 19 U. S. C. §1311, together with the Regulations thereunder (19 C. F. R. Parts 18 and 19) and the associated provisions of the Internal Revenue Code (26 U. S. C. §§5521 and 5522), constitute a comprehensive, exclusive and preemptive Federal program for the promotion of exports of liquor in foreign commerce, and hence Idlewild is entitled to the relief it seeks even if, contrary to the uniform New York decisions, the Alcoholic Beverage Control Law should be held applicable here (*Penagaricano* v. *Allen Corporation*, 1 Cir., 267 F. 2d 550, 557-558; *All American Airways* v. *Village of Cedarhurst*, 2 Cir., 201 F. 2d 273, 277);

(c) The New York Courts have uniformly held that the New York Alcoholic Beverage Control Law is inapplicable or "inoperative" if applied to sales of liquor for export in foreign commerce under constant United States Customs Bond, regulation and supervision,—the very transactions here involved. (*Matter of Gulf Oil Corp.* v. *McGoldrick*, 256 App. Div. 207, 209, 210 (1st Dept., 1939), aff'd 281 N. Y. 647, aff'd *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414; *During* v. *Valente*, 267 App. Div. 383, 386 (1st Dept., 1944); *Rosenblum* v. *Frankel*, 279 App. Div. 66, 68 (1st Dept., 1951);

(d) The State Court remedies provided by the New York Alcoholic Beverage Control Law, §121, have already been judicially considered and held "inadequate" (*Burack* v. *State Liquor Authority of the State of New York*, 160 F. Supp. 161, 165 (E. D. N. Y., 1958)?

(4) Where the Court of Appeals has dismissed appeals from orders otherwise appealable, on the ground that such orders were made without jurisdiction because only a district court of three judges could determine the "substantial federal question" presented, should the Court of Appeals vacate the orders under appeal and remand the case to the District Court for proceedings not inconsistent with its decision (28 U. S. C. §2106; *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 3 Cir., 266 F. 2d 427, 433; *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 6 Cir., 252 F. 2d 317, 319; *Board of Supervisors* v. *Tureaud*, 5 Cir., 207 F. 2d 807, 810, vacated and remanded on other grounds, 347 U. S. 971.)?

(5) Are the judges of the Federal District Courts so bound by the doctrine of "the law of the case" that they are required to follow a prior decision of another district judge of the same Court without regard either to a radical change in the circumstances presented to the first judge or a subsequent holding by the Circuit Court of Appeals that the decision of the first district judge was erroneous and without jurisdiction?

Constitutional and Statutory Provisions Involved

(1) Federal Constitutional Provisions

(a) "The Congress shall have Power * * * To regulate Commerce with foreign Nations" (Art. I, §8).

(b) "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports" (Art. I, §10).

(c) "This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" (Art. VI).

(2) Federal Statutes and Regulations

The Appendix sets forth the pertinent provisions of the Federal Statutes providing for (a) a district court of three judges in constitutional cases 28 U. S. C. §§2281 and 2284 (1) and (3) (148a); (b) original jurisdiction of the federal district courts in federal question cases and cases arising under any Act of Congress regulating commerce, 28 U. S. C. §§1331 and 1337 (149a); (c) appellate jurisdiction of the Circuit Court of Appeals over final orders and interlocutory orders of the district courts refusing injunctions, 28 U. S. C. §§1291 and 1292(a)(1) (149a); (d) the powers of the federal appellate courts, 28 U. S. C. §2106 (150a); and (e) the pertinent substantive provisions of the Federal Tariff Act of 1930, 19 U. S. C. §1311 (17a), together with the applicable regulations thereunder, 19 C. F. R. Parts 18 and 19 (154a), and associated provisions of the Internal Revenue Code, 26 U. S. C. §§5521, 5522, and 5523 (150a).

(3) New York State Statutory Provisions

The pertinent provisions of the New York Alcoholic Beverage Control Law are reprinted in the Appendix (30a-33a).

Statement of the Case

(1) The Importance of this Case

These petitions for certiorari and/or mandamus are Idlewild's last resort in its long quest for a remedy for its admittedly "substantial" Federal rights under the Constitution and laws of the United States invoked in its complaint.

Here are many questions of importance to the due administration of justice throughout the federal system, as evidenced by the bewilderingly different views expressed in the five judicial opinions presented for review.

Such questions include (a) Idlewild's statutory right of access to the federal district courts to protect its substantial constitutional and statutory federal rights against State interference where the federal rights are preemptive and exclusive, the State courts themselves have so held, and the State judicial remedies are inadequate; (b) the proper tribunal to determine such federal rights in the first instance; (c) the appellate jurisdiction of the Circuit Courts of Appeals and of this Court in such cases; and (d) the proper application of the "law of the case" by the federal district courts.

The decisions below have left the proverbial "little fellow" helplessly caught in the gears of the cumbersome machinery of justice amid a welter of contradictory decisions possessing but one common denominator,—a refusal to afford a remedy for Idlewild's substantial Federal rights in a situation where the Court of Appeals has de-

scribed the plaintiff Idlewild as "a party who we believe is entitled to relief."

This case, we submit, cries out for review by this Court to the end that others may not become inextricably enmeshed in a similar procedural web, after four decisions and five different opinions, and with a hearing on the merits not yet in sight a year after this urgent case was commenced and large expense has been necessitated.

(2) The Nature of the Case

This action is for declaratory and injunctive relief and for an adjudication that the Constitution and laws of the United States preclude the application of the New York State Alcoholic Beverage Control Law to Idlewild's export business and the destruction thereof by the New York Liquor Authority.

As Judge Dimock noted (98a):

> "Plaintiff certainly raises a serious legal issue when it states that what New York is regarding as unlawful has been ruled by the United States to be lawful foreign commerce."

The Court of Appeals thrice held that "a substantial federal question" is thus presented (104a, 107a, 108a).

(3) Idlewild's Lawful Export Business

Idlewild, a New York corporation, is engaged in selling United States Customs bonded, tax-free wines and liquors, solely for export, to overseas passengers from premises leased from the New York Port Authority, a bi-State agency, at Idlewild Airport (49a-50a, 90a, 130a-131a).

Each bottle of liquor sold by Idlewild remains under continuous United States Customs bond, regulation and supervision from the time it is withdrawn from Class 6

United States Government bonded manufacturing warehouses, and the United States Customs bonded storage warehouses; during the time it is rewarehoused at Idlewild's premises under United States Customs control, until the bottle is placed aboard the aircraft for delivery to the passenger only upon and after arrival at his foreign destination (3a-5a, 36a). Idlewild is required to account, on United States Customs forms, for each and every bottle (3a, 36a).

The privilege accorded the outgoing passenger to export liquor free of tax and duty here or abroad is reciprocal to the privilege accorded incoming passengers to purchase a limited quantity of liquor in foreign countries for import into the United States free of tax or duty here or abroad (5a-6a, 37a).

The obvious purposes of the right of thus exporting a bottle of liquor tax-free are (1) to encourage foreign commerce, and (2) to promote domestic exports,—a particularly pressing national interest in view of the present crisis in our balance of payments.

The United States Treasury Department, Bureau of Customs, supervises the conduct of Idlewild's business. It has approved Idlewild's premises, and has prescribed Idlewild's procedures. Finally, the United States Treasury Department, Bureau of Customs has expressly ruled that Idlewild's business constitutes the exportation of merchandise within the meaning of §311 of the Tariff Act of 1930, 19 U. S. C. §1311 (50a, 131a, 15a-20a).

The New York State Tax Commission has also ruled that a business such as Idlewild's, which consists of sales of liquor in United State Customs bond withdrawn from Class 6 warehouses under federal regulation, is not a "sale" subject to the New York State Alcoholic Beverage tax. Tax Law §§420(10), 424, 429 (26a-27a).

(4) The State Liquor Authority's Assertion that Idlewild's Business is "Illegal" under New York Law

Out of an abundance of caution, Idlewild inquired of the State Liquor Authority whether its business was subject to the New York State Alcoholic Beverage Control Law. The State Liquor Authority sought and obtained an opinion from the New York State Attorney-General (1960, Op. Atty. Gen., June 30) to the effect that (1) Idlewild's business constituted a "sale" within the meaning of the Alcoholic Beverage Control Law, §3(28), but (2) there is no provision of that Law which would authorize a license for such sales for export, and (3) no person can sell alcoholic beverages within New York without a license (51a, 90a, 131a, 21a-24a).

Thereupon the State Liquor Authority determined, and so advised Idlewild's counsel (25a), that its business

> "* * * is in conflict with the laws of the State of New York and, therefore, would be illegal."

(5) The Institution of this Action to Protect Idlewild's Federal Rights

The immediate practical effect of this "determination" was to place Idlewild in dire jeopardy. As Judge Bicks found (51a, 188 F. Supp. at p. 436):

> "The New York Importers & Distillers Association circularized its members advising that in view of the position of the Attorney General and of §62 of the Alcoholic Beverage Control Law, they could not legally fill plaintiff's orders. Plaintiff has not since been able to make purchases to meet its requirements and faces the prospect of closing its doors, with consequent substantial damage."

This action was accordingly instituted on July 22, 1960, for the protection of Idlewild's constitutional and statutory rights; and a motion for the impanelling of a three-judge court pursuant to 28 U. S. C. §§2281 and 2284 (32a) and an application, by order to show cause, for a temporary injunction (33a-34a) were filed and served simultaneously with the complaint.

(6) The Representations of the State Liquor Authority Before Judge Bicks that Idlewild's Business was not Threatened

Confronted with the square conflict between their claim of illegality under State Law and Idlewild's federal rights, the State Liquor Authority sought to delay an adjudication. It appeared before Judge Bicks by the Attorney-General of the State of New York and cross-moved to dismiss the complaint on the ground that the state courts afforded an "efficient remedy" and that (42a, 75a):

> "The complaint makes no claim that the State Liquor Authority is threatening, directly or indirectly, to take steps to interfere with plaintiff's operations. Since the plaintiff is a non-licensee, there is no real action the State Liquor Authority can take against the plaintiff."

(7) Judge Bicks' Decision Remitting Idlewild to the State Courts

Because of what he deemed to be the "tentative and hypothetical posture" of the case before him (53a), Judge Bicks decided (55a, 188 F. Supp. 437-8):

> "Although the substantive issues raised in the complaint may not be considered by the judge to whom application under 28 U. S. C. A. §2281 is made, he has

the power to retain jurisdiction pending state court adjudication where, as here, there is insufficient basis to support intervention by a federal court of equity. (Citing cases)

"Motion for impanelling of a three-judge court denied, with leave to renew after the state court has ruled."

Judge Bicks' decision disregarded Idlewild's statutory right to the exercise by him of original jurisdiction under 28 U. S. C. §§1337 and 1331.

(8) Idlewild's Appeal and the Immediate Extra-legal Retaliation by the State Liquor Authority

Idlewild promptly appealed Judge Bicks' decision (56a).

Five days later, the State Liquor Authority issued a subpoena *duces tecum* directed to Idlewild. Notwithstanding its representations before Judge Bicks that "since the plaintiff is a non-licensee, there is no real action the State Liquor Authority can take against the plaintiff" (64a, 67a, 75a), the subpoena expressly required Idlewild to appear and testify concerning its business "*under the license to sell alcoholic beverages issued by the State Liquor Authority*" (69a).*

Thus, the State Liquor Authority, acting under color of State law, reversed its field and went back on its representation to Judge Bicks that "there is no real action" or "steps to interfere" which it could take against Idlewild. Instead, it sought to cut in ahead of the Court of Appeals and to hale Idlewild before itself for an inquisition as prosecutor, judge and jury to pass upon its own assault upon Idlewild's Federal rights.

No more overt interference could there be than the bald threats thereafter made on three occasions by officials of the State Liquor Authority to the several United States

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* Emphasis has been supplied throughout this petition.

Customs bonded interstate truckers who had been making deliveries to Idlewild (76a, 78a-81a). This was a palpable attempt, *vi et armis*, to frustrate Idlewild's resort to the federal courts by choking off its last lifeline of supply from out-of-state sources to which Idlewild had been driven because the State Liquor Authority's prior determination of illegality had frightened off its New York suppliers (51a, 131a).

(9) Judge Dimock's Decision

Accordingly, Idlewild again moved for a temporary injunction *pendente lite* and for the impanelling of a three-judge court (71a-72a). This motion, together with Idlewild's application to quash the subpoena *duces tecum*, came on before Judge Dimock, who held that he had to follow Judge Bicks (89a), but that (91a):

> "Plaintiff is entitled to an injunction against harassment by defendant pending the appeal from the order of Judge Bicks."

(10) The Court of Appeals' Decision

A majority of the Court of Appeals, Chief Judge Lumbard dissenting, held that since "a substantial federal question existed" (104a, 107a, 108a), "a three-judge district court should have been convened" by Judge Bicks and Judge Dimock to decide, *inter alia*, whether to apply the so-called doctrine of "abstention" (109a, 110a). Accordingly, although the orders of both judges were held to be otherwise appealable (105a-106a, 109a, 111a), the majority held that *since* Judge Bicks and Judge Dimock "had no jurisdiction to proceed * * * we must conclude from *Stratton* that we have no jurisdiction to entertain an appeal" from either decision (108a, 110a).

The majority conceded "this result leaves us in a somewhat anomalous position" (108a), and concluded (110a):

> "The results we reach are unhappy ones. We are refusing access to our court to a party who we believe is entitled to relief."

Idlewild's statutory right to the exercise of original jurisdiction by the District Court with a single judge under 28 U. S. C. §§1337 and 1331 was at least impliedly overruled.

In his dissenting opinion Chief Judge Lumbard took issue, saying (114a-115a):

> "The majority's view, however, imposes on the federal courts a procedure of piecemeal review whereby a court of appeals is always forced to stay its hand whenever an appellant or appellee argues to it that the decision below should have been made by a three-judge court. No matter how worthless such a claim may be, we would not be able to dispose of it on an appeal from a final order but would have to await a decision on a petition for mandamus in the Supreme Court. Only after the Supreme Court decided the jurisdictional question might we be permitted to consider the merits, and the merits would not be ripe for Supreme Court review until we had passed upon them on remand. I cannot believe that the authority of the Supreme Court over three-judge tribunals was intended to extend so far as to preclude us from deciding the jurisdictional issue when a district judge enters an order that is otherwise appealable under 28 U. S. C. §§1291, 1292, and thereby to impose on the parties a procedure calling for separate appellate consideration of the jurisdictional and substantive questions."

Thus, the sure result of the majority decision of the Court of Appeals will be to flood this Court with petitions for mandamus whenever, in a case where Federal constitutional rights are involved the district court applies the so-called doctrine of abstention or claim has been unsuccessfully made for decision by a three-judge court.

(11) Judge Cashin's Decision

Idlewild promptly sought to comply with the decision of the Court of Appeals and moved again in the District Court to convene a three-judge district court and for injunctive relief, in accordance with the procedure suggested by this Court in *Stratton* v. *St. Louis S. W. Ry. Co.*, 282 U. S. 10, 18, and by Mr. Justice Stewart in *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 6 Cir., 252 F. 2d 317, 319.

Judge Cashin denied these applications. He characterized as "dictum" the holding by the Court of Appeals that "a three-judge district court should have been convened" (132a); and, overlooking the very *ratio decidendi* of that Court, he followed as "the law of this case" and "as still in full force and effect" (133a) the very refusals by Judge Bicks and Judge Dimock to convene a three-judge district court which the Court of Appeals had just held to be erroneous, without jurisdiction and hence nullities. *Valley* v. *Northern Fire Ins. Co.*, 254 U. S. 348, 353-4; *McQuillen* v. *Dillon*, 2 Cir., 98 F. 2d 726, 729, cert. den. 305 U. S. 655; *Pollitz* v. *Wabash R. Co.*, 180 F. 950, 951 (C. C. S. D. N. Y.).

(12) The Court of Appeals' Refusal to Recall and Clarify Its Judgment

In a final effort to avoid burdening this Court, counsel and the litigants with the expenditure of time, money and effort entailed by these conflicting judicial expressions, Idlewild moved in the Court of Appeals for an order clarifying its judgment of dismissal (as authorized by *National Comics Publications* v. *Fawcett Publications*, 2 Cir., 198 F. 2d 927 and *Epstein* v. *Goldstein*, 2 Cir., 110 F. 2d 747, 748) so as to test Judge Cashin's characterization as "dictum," and to remand this case to the District Court for "such further proceedings * * as may be just under the cir-

cumstances," as authorized by 28 U. S. C. §2106 and as was done under similar circumstances in *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 3 Cir., 266 F. 2d 427, 433, and *Board of Supervisors* v. *Turcaud*, 5 Cir., 207 F. 2d 807, 810, vacated and remanded on other grounds in 347 U. S. 971.

The Court of Appeals' denial was without opinion (147a).

ARGUMENT

POINT I

Idlewild's petition for certiorari to review the admittedly "anomalous" majority decision of the Circuit Court of Appeals presents important questions of federal constitutional and statutory law and of judicial jurisdiction which should be settled by this Court.

(1) The majority in the Court of Appeals held that since "a substantial federal question exists" (104a, 107a) in this case,

> "* * * we are of the opinion that the determination of whether a federal court ought to abstain is a determination that may only be made in the first instance by a three-judge district court" (108a).

(2) All three judges in the Court of Appeals agreed that "the orders made by Judges Bicks and Dimock are of the sort which are ordinarily appealable" to that Court under 28 U. S. C. §§1291 and 1292(a)(1) (105a-106a, 109a, 111a).

The majority, however, reached the frankly "*anomalous position*" (108a) of distinguishing the recent decision of the Second Circuit in *Bell* v. *Waterfront Commission of*

New York Harbor, 2 Cir., 279 F. 2d 853 (107a, 109a), and of dismissing Idlewild's appeals, on the very grounds that Idlewild was right in its contentions that "a substantial federal question existed" on constitutional grounds and that "a three-judge district court should have been convened" by Judge Bicks and Judge Dimock (109a).

(3) Also, Idlewild's complaint challenges, in addition, the regulatory power of the State Liquor Authority on Federal *statutory* grounds (irrespective of constitutional issues) of which a *single* federal district judge clearly has original federal jurisdiction under 28 U. S. C. §§1331, 1337. (*Ex Parte Bransford*, 310 U. S. 354, 361.)

Thus, Idlewild contends that Section 311 of the Federal Tariff Act of 1930, 19 U. S. C. §1311, and the detailed federal regulation and supervision of the exports here involved are preemptive, and "the scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it". *Pennsylvania* v. *Nelson*, 350 U. S. 497, 502; *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230.

The effect of the decision of the Court of Appeals was also to nullify this statutory right to original jurisdiction.

(4) Idlewild further contends, *inter alia*, that the State Liquor Authority is attempting here to misapply the New York Alcoholic Beverage Law to exports in foreign commerce, contrary to the uniform rulings of the New York courts themselves and contrary to Idlewild's Federal statutory rights.

"In such a case the attack is aimed at an allegedly erroneous administrative action" which "does not require a three-judge court" even though based on "the unconstitutionality of the result obtained". (*Ex Parte Bransford*, 310 U. S. 354, 361.)

(5) Here the majority in the Court of Appeals held that the mere presence of substantial Federal Constitutional questions as to state action (a) deprived a single district judge, otherwise vested with original federal jurisdiction on non-constitutional grounds under 28 U. S. C. §§1331 and 1337, of all jurisdiction to decide the issues, and (b) deprived the Court of Appeals of jurisdiction to review such decisions, although they are "ordinarily appealable" (105a-106a, 109a, 111a) under 28 U. S. C. §§1291, 1292(a)(1).

POINT II

This petition for certiorari also presents for review the failure and refusal by the Court of Appeals to vacate the orders below which it itself held were rendered without jurisdiction,—a refusal in conflict with decisions of the Courts of Appeals for the Third, Fifth and Sixth Circuits and in conflict with the implications of decisions by the Supreme Court.

(1) *Stratton* v. *St. Louis S.W. Rwy. Co.*, 282 U. S. 10, was the decision principally invoked by the majority of the Court of Appeals for its holding that Idlewild's "proper remedy was a writ of mandamus from the Supreme Court." But in the *Stratton* case, this Court held (282 U. S. at p. 18) that although a writ of mandamus was still available:

> "It is not necessary, however, that formal application should be made for such a writ, as the District Court may now proceed to take the action which the writ, if issued, would require."

In keeping with this recommendation by this Court, Idlewild thereupon attempted to comply with the majority decision of the Court of Appeals by renewing its appli-

cation to the District Court for the impanelling of a three-judge court and for injunctive relief (117a). This was the procedure proposed by Judge (now Mr. Justice) Stewart in *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 6 Cir., 252 F. 2d 317, 319:

> "Were we to agree with the appellant's position that a court of three judges should have been convened, it would be our duty now to dismiss the appeal for want of jurisdiction. *An application to the Supreme Court for a writ of mandamus would then be available if the district judge declined to take steps to effectuate the convening of a three judge tribunal.*" (Emphasis added.)

But when Judge Cashin characterized as "dictum" the majority decision of the Court of Appeals that the orders of Judges Bicks and Dimock were without jurisdiction, Idlewild applied to that Court for rectification or clarification of its mandate (as was done in *National Comics Publications* v. *Fawcett Publications*, 2 Cir., 198 F. 2d 927 and *Epstein* v. *Goldstein*, 2 Cir., 110 F. 2d 747, 748) so as to make *explicit* what the majority decided:—that the orders of Judge Bicks and Judge Dimock were nullities since without jurisdiction, were in consequence vacated, and the case was remanded to the District Court for further proceedings not inconsistent with the decision of the Court of Appeals (146a).

Such was the procedure adopted under identical circumstances by the Third Circuit in *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 3 Cir., 266 F. 2d 427 where the Court held that a three-judge district court was required and concluded (p. 433):

> "Consequently we will vacate the judgment of the court below and will remand the cause for appropriate action."

Again, in *Board of Supervisors* v. *Tureaud*, 5 Cir., 207 F. 2d 807, vacated and remanded on other grounds, 347 U. S. 971, the Court concluded (p. 810):

> "We are in no doubt that the suit from which this appeal comes was one for three judges, that the district judge was without jurisdiction to hear and determine the application for injunction, and that *the order should be vacated and the cause remanded to the district judge with directions to take further proceedings not inconsistent herewith.*" (Emphasis added.)

Such a procedure, in our view, is squarely authorized by 28 U. S. C. §2106, which confers upon the federal appellate courts jurisdiction to review and to:

> "• • • remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."

We respectfully submit that by refusing to clarify its judgment, the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision". (This Court's Rule 19(1)(b).)

POINT III

Also a writ of mandamus is a further proper means of requiring Judge Bicks and Judge Dimock to convene a three-judge court for determining Idlewild's constitutional rights, or, failing that, to exercise for the protection of the plaintiff's statutory rights original jurisdiction under 28 U. S. C., Sections 1337 and 1331.

(1) These Sections expressly confer upon the District Courts "original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce," or (when the controversy exceeds $10,000 in value) "under the Constitution, laws or treaties of the United States". (See Complaint, 1a *et seq.*)

(2) *"Where the issue is essentially federal, the federal court proceeds at once."* (*All American Airways* v. *Village of Cedarhurst,* 2 Cir., 201 F. 2d 273, 277.) Idlewild's federal rights arise not only under the Constitution but also under a comprehensive and preemptive federal statutory and regulatory scheme and program in the national interest for the promotion of exports of domestic liquor in foreign commerce free of Federal or State tax.

This federal scheme was adopted by Congress in the exercise of its "exclusive and plenary" constitutional power to "regulate commerce with foreign Nations" (Art. I, §8, par. 3),—a power which "may not be limited, qualified or impeded to any extent by state action". *Board of Trustees* v. *U. S.*, 289 U. S. 48, 56-57; *National Distillers Products Corp.* v. *City and County of San Francisco,* Cal., 297 P. 2d 61, 65. The "exclusive and plenary" Federal power is "buttressed by" the Import-Export Clause (Art. I, §10, par. 2), *Board of Trustees* v. *U. S., supra,* 289 U. S. at pp. 56-57; *Parrott & Co.* v. *City and County of San Fran-*

cisco, Cal., 280 P. 2d 881, 885, and by "the supremacy of the national power in the general field of foreign affairs", *Hines* v. *Davidowitz*, 312 U. S. 52, 62.

This preemptive Federal program for commerce with foreign countries is, as stated at the outset hereof, embodied in Section 311 of the Tariff Act of 1930, 19 U. S. C. §1311 and the associated provisions of the Internal Revenue Code, 26 U. S. C. §§5521 and 5522; and it also involves a reciprocal *pro tanto* tax immunity as regards foreign countries. It is also implemented by detailed regulations and actual supervision and control by the United States Treasury Department, Bureau of Customs under the Tariff Act (19 C. F. R. Parts 18 and 19).

Accordingly, particularly in view of the current crisis in our balance of payments, we are dealing here with a national concern "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject". *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230; *Pennsylvania* v. *Nelson*, 350 U. S. 497, 504; *Hines* v. *Davidowitz*, *supra*, 312 U. S. 52, 62-69.

Moreover, "the scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it". *Pennsylvania* v. *Nelson*, *supra*, 350 U. S. at p. 502; *Rice* v. *Santa Fe Elevator Corp.*, *supra*, 331 U. S. 218, 230.

Accordingly, we submit, since the exported liquor here involved is in a Federal enclave and under Federal sovereignty, the Federal courts may not abandon their *statutory* jurisdiction and obligation in exaggerated deference to "comity". *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, 386, 391-2; *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 536-538; *Maynard & Child, Inc.* v. *Shearer*, Ky., 290 S. W. 2d 790, 794.

Both the specific terms of the Constitution and the federated structure of our Government forbid New York and its agencies to trespass upon legislation and regulation by Congress acting in its own domain.

If the Alcoholic Beverage Control Law is inapplicable, Idlewild will be entitled to an injunction against its attempted enforcement here. If, on the other hand, the New York Law is applicable in its terms, then "it would conflict with federal law and the ban of the supremacy clause would come into play." *Penagaricano* v. *Allen Corporation*, 1 Cir., 267 F. 2d 550, 558. For this reason, the Court upheld the exercise of jurisdiction in the *Penagaricano* case, *supra*, stating (267 F. 2d at pp. 557-558):

> "* * * a preliminary glance at the apparent clash between federal and local authority reveals that * * * the exercise of federal authority here involved is wholly within the confine of a valid federal enactment * * *. And, whatever the local courts may hold to be the meaning of the local Act, the plaintiffs will be entitled to relief from its application. That is to say, *the plaintiffs will be entitled to the relief they request whichever way the local Act is construed.*" (Emphasis added.)

Thus, even if the terms of the Alcoholic Beverage Control Law should be construed to be applicable here, contrary to the uniform decisions of the New York Courts (p. 26, *infra*), "there can be no doubt" of the "direct clash" of the New York Statute "with the federal regulations" and hence "no occasion for postponement here for possible state action." *All American Airways* v. *Village of Cedarhurst*, 2 Cir., 201 F. 2d 273, 277; *Chicago* v. *Atchison Topeka & Santa Fe R. Co.*, 357 U. S. 77, 84, 89; *California Commission* v. *United States*, 355 U. S. 534, 538, 539.

(3) The assertion of the State Liquor Authority that under New York Law the plaintiff's business was "illegal" (25a) created an issue and was sufficient in itself to deter the plaintiff's domestic suppliers (51a, 131a). Hence Judge Bicks was mistaken in regarding the issue as

in a merely "tentative and hypothetical posture" (53a, 188 F. Supp. at p. 436).

In *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73, this Court reversed a three-judge District Court which had dismissed a declaratory-judgment complaint on the ground that there was no "existing dispute as to present legal rights" but only "a mere prospect of interference posed by the bare existence of the law in question" (362 U. S. at p. 85). This Court, in language applicable *a fortiori* here, said (362 U. S. at pp. 85-86):

> "It is therefore evident that there is an existing dispute between the parties as to present legal rights amounting to a justiciable controversy which appellants are entitled to have determined on the merits."

(4) Furthermore, Judge Bicks was not justified in abdicating his statutory jurisdiction, for such abdication is justified only in extraordinary circumstances, wholly absent here. As this Court held in *Allegheny County* v. *Mashuda Co.*, 360 U. S. 185, 188-189:

> "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest."

POINT IV

Furthermore, there was also no occasion to abstain in deference to the New York courts because those courts have settled the State Law in Idlewild's favor, and also because the state remedies are inadequate.

(1) In *Hillsborough* v. *Cromwell*, 326 U. S. 620, 629, this Court held that there was no occasion for "remitting the claimant to the state courts for determination of the local law question" where, as here, the State courts have given "an authoritative interpretation of the local law."

The New York courts have recognized the "exclusive and plenary" power of Congress to regulate foreign commerce; "the careful control exercised by government officials over goods that have been taken into Class 6 Warehouses"; and the fact that such goods are "constantly under government supervision" pursuant to Section 311 of the Tariff Act of 1930,—the very Federal statute invoked by Idlewild here under like circumstances (*Matter of Gulf Oil* v. *McGoldrick*, 256 App. Div. 207, 209, 210 (1st Dept., 1939), aff'd 281 N. Y. 647, aff'd *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414).

Accordingly, the New York courts have held that the New York Alcoholic Beverage Control Law,—the very statute which the State Liquor Authority here invokes, was not applicable, or was "inoperative" if applied, to sales of liquor under United States Customs bond, regulation and supervision, for export in foreign commerce,—the very transactions here involved. (*During* v. *Valente*, 267 App. Div. 383, 386 (1st Dept., 1944). The New York courts have therefore held that "international transactions in alcoholic beverages • • • would be beyond the regulatory powers of the State Liquor Authority." (*Rosenblum* v. *Frankel*, 279 App. Div. 66, 68 (1st Dept., 1951)).

(2) Furthermore, "abstention" is improper where, as here, the state remedies are, as here, inadequate.

In the first place, as this Court held in *California Commission* v. *United States*, 355 U. S. 534, abstention is improper where, as here, "The Commission has plainly indicated an intent to enforce the Act" (355 U. S. at p. 538), and the "issue is a constitutional one that the Commission can hardly be expected to entertain" (355 U. S. at p. 539). This Court concluded (p. 539):

> "But where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right."

In the second place, Alcoholic Beverage Control Law §121, on which the State Liquor Authority relied before Judge Bicks (64a-65a), provides the sole method for judicial review of determinations of the State Liquor Authority, but limits any stay by the New York courts in such a proceeding "for a period not exceeding thirty days". *Matter of Yacht Club Catering* v. *Bruckman*, 276 N. Y. 44 holds that this period is mandatory, regardless of "irreparable damage to the individual" (276 N. Y. at p. 48). In accord: *Barcus* v. *O'Connell*, 281 App. Div. 1064 (3rd Dept., 1953).

For this reason, the State "remedy" afforded by Section 121 is utterly "inadequate", *Burack* v. *State Liquor Authority of the State of New York*, 160 F. Supp. 161 (E. D. N. Y., 1958), where the Court held (p. 165):

> "A further reason for my conclusion is the provision in §121, *supra*, that no stay shall be granted pending the determination of the matter for a period of more than thirty days. That period may not be extended. *Barcus* v. *O'Connell*, 281 App. Div. 1064, 121 N. Y. S. 2d 366. Because of that 30-day provision the time still available for the filing and final determi-

> nation of state court proceedings is inadequate. Even if the plaintiff should be successful in such a proceeding he would win but a Pyrrhic victory."

In *Pacific Tel. Co.* v. *Kuykendall*, 265 U. S. 196, this Court noted that the State law permitted a stay against a decision of a State administrative tribunal for only a limited period (there, one year). This Court reversed the decision of the district court refusing jurisdiction, and held (pp. 204-205):

> "Under such circumstances *comity yields to constitutional right*, and the fact that the procedure on appeal in the legislative fixing of rates has not been concluded will not prevent a federal court of equity from suspending the daily confiscation, if it finds the case to justify it." (Emphasis added.)

Even under the statutes forbidding the district courts to exercise jurisdiction over a challenge to State taxes or rate orders, this Court has uniformly held that the district court should exercise jurisdiction unless it affirmatively appears that "a plain, speedy and efficient remedy may be had in the courts of such State." 28 U. S. C. §§1341, 1342. *Corporation Comm.* v. *Cary*, 296 U. S. 452, 458; *Mountain States Co.* v. *Comm.*, 299 U. S. 167, 170; *Driscoll* v. *Edison Co.*, 307 U. S. 104, 110; *Hillsborough* v. *Cromwell*, *supra*, 326 U. S. 620, 628.

POINT V

A writ of mandamus to review the decision of Judge Dimock, as well as the decision of Judge Bicks, is likewise proper here.

(1) Judge Dimock acknowledged (91a):

> "Plaintiff certainly raises a serious legal issue when it states that what New York is regarding as unlawful has been ruled by the United States to be lawful foreign commerce."

Judge Dimock further recognized that after Judge Bicks' decision and Idlewild's ensuing appeal, the State Liquor Authority was attempting to drive Idlewild out of business forthwith: first under color of State law, then by its *subpoena duces tecum*, and then by overt threats to the interstate truckers who were Idlewild's last lifeline of supply. Accordingly, he granted a stay pending the appeal from Judge Bicks (91a, 93a-95a).

In our view, the error in Judge Dimock's decision was in his narrow application of the doctrine of the "law of the case" by mechanically following Judge Bicks, despite the State Liquor Authority's subsequent repudiation of its aforesaid representations to Judge Bicks and despite the fact that under these changed circumstances "there is no imperative duty to follow the earlier ruling." *Dictograph Products Co.* v. *Sonotone Corp.*, 2 Cir., 230 F. 2d 131, 135, dism. per stipulation 352 U. S. 883.

(2) We also respectfully submit that, for the following reasons, Judge Dimock further erred in denying Idlewild's application to quash the *subpoena duces tecum* issued by the State Liquor Authority.

(a) The *subpoena* was an overt effort by the State Liquor Authority to constitute itself as the tribunal to pass upon its own assault on Idlewild's Federal rights and upon constitutional issues which the State Liquor Authority "can hardly be expected to entertain." *California Commission* v. *United States, supra,* 355 U. S. at p. 539.

(b) Since the State Liquor Authority has no power to regulate or license Idlewild's export business, *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 539, its subpoena power is correspondingly confined to matters within its jurisdiction to regulate or license. *Gen. Tobacco & Grocery Co.* v. *Fleming,* 6 Cir., 125 F. 2d 596; *Federal Trade Comm.* v. *Smith,* 34 F. 2d 323 (S. D. N. Y., 1929); *Securities & Exchange Comm.* v. *Tung Corp.*, 32 F. Supp. 371, 373 (N. D. Ill., 1940).

(c) The subpoena was invalid under New York law since Civil Practice Act §406(1) expressly precludes administrative subpoenas relating to "a matter arising, or an act to be done, in an action in a court of record"; and this "matter" was then actively *sub judice.*

(d) Judge Dimock's denial of his power to quash the subpoena was directly contrary to his own decision in *Bell* v. *Waterfront Comm. of N. Y. Harbor,* 183 F. Supp. 175, 177, aff'd 2 Cir., 279 F. 2d 853, 858-9. See also *Albee Godfrey Whale Creek Co.* v. *Perkins,* 6 F. Supp. 409, 410 (S. D. N. Y., 1933).

POINT VI

Judge Cashin's decision constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision by writ of mandamus.

As already noted, Idlewild promptly sought to comply with the majority opinion in the Court of Appeals by renewing its application to the District Court for the convening of a three-judge district court and for injunctive relief.

This was precisely in accordance with the procedure suggested by this Supreme Court in *Stratton* v. *St. Louis S. W. Ry. Co.*, *supra* 282 U. S. 10, 18, and by Judge (now Mr. Justice) Stewart in *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, *supra*, 252 F. 2d at p. 319.

Judge Cashin was clearly in error in characterizing as "*dictum*" the very essence and *ratio decidendi* of the majority of the Court of Appeals, thus clearly stated in their opinion (108a, 110a):

> "Having decided that Judge Bicks had no jurisdiction to proceed as he did, we must conclude from *Stratton* that we have no jurisdiction to entertain an appeal from his decision.
>
> "* * * we must hold that inasmuch as Judge Dimock exercised power properly exercisable only by a three-judge district court we have no jurisdiction to hear an appeal from his order."

Nevertheless Judge Cashin brushed these rulings aside as "dictum," and held himself bound to follow as "the law of this case" and "as still in full force and effect" the very orders which the Court of Appeals had just held to have been made without jurisdiction and hence without existence in law.

Having been rendered *without jurisdiction*, the orders of Judge Bicks and Judge Dimock were as a matter of law "nullities" and "void", *Valley* v. *Northern Fire Ins. Co.*, 254 U. S. 348, 353-4; *McQuillen* v. *Dillon*, 2 Cir., 98 F. 2d 726, cert. den. 305 U. S. 655; *Pollitz* v. *Wabash R. Co.*, 180 Fed. 950, 951 (C. C. S. D. N. Y.).

But even if these orders by Judges Bicks and Dimock, rendered without jurisdiction, could by any stretch of imagination possibly constitute "the law of this case," Judge Cashin was under "no imperative duty to follow" them. *Dictograph Products Co.* v. *Sonotone Corp.*, *supra*, 230 F. 2d at p. 135.

Judge Cashin suggested (a) an application for reargument to Judge Bicks,—a remedy which was wholly illusory as practical matter (141a), and also (b) an application for a writ of mandamus (135a).

Conclusion

Idlewild respectfully prays this Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit, and or for leave to file its petition for writs of mandamus directed to Judge Bicks, Judge Dimock and Judge Cashin; and for such other reliefs as may be just and proper.

Respectfully submitted,

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(881)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

RECEIVED
JUN 28 1961
OFFICE OF THE CLERK
SUPREME COURT, U. S.

No. 138

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against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Respondents.

Misc. 180

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

Petitioner,

against

HONORABLE ALEXANDER BICKS, HONORABLE EDWARD J. DIMOCK, HONORABLE JOHN M. CASHIN, Judges of the United States District Court for the Southern District of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND IN OPPOSITION TO MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

40 copies

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A. The single-judge District Court did have jurisdiction to pass upon all questions preliminary to the question of constitutionality, among which was the question of power to order abstention and to retain jurisdiction, pending the construction of the State statutes by the State Courts, in order to determine whether there did exist, in fact, a substantial question under the Federal Constitution 10

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B. Assuming, *arguendo*, that the one-judge District Court did not have jurisdiction to enter the order of abstention, since there is no prejudice to the petitioner as a result of the failure at this time to convene the three-judge District Court, this Court will not now disturb the *status quo* 11

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND IN OPPOSITION TO MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

Opinions Below

The first opinion of the District Court (BICKS, J.), dated November 4, 1960, is reported at 188 F. Supp. 434 (App. to Petition, pp. 49a-55a).

The second opinion of the District Court (DIMOCK, J.), dated December 28, 1960, has not as yet been officially reported (App. to Petition, pp. 88a-92a).

The majority and dissenting opinions of the Court of Appeals, dismissing petitioner's appeals from the foregoing decisions have not yet been officially reported (App. to Petition, pp. 103a-115a).

The subsequent decision of the District Court (CASHIN, J.), dated May 3, 1961, has not as yet been officially reported (App. to Petition, pp. 130a-135a).

Jurisdiction

Petitioner invokes the certiorari jurisdiction of this Court under 28 U. S. C. § 1254 (1).

Jurisdiction of the motion for leave to file a petition for a writ of mandamus is invoked by the petitioner under 28 U. S. C. § 1651 (a).

Questions Presented

(1) Where a District Court, consisting of one judge, enters an order which it has no jurisdiction to enter, and the Court of Appeals, on the ground of lack of jurisdiction, dismisses an appeal therefrom, may a petition for certiorari to the Court of Appeals be granted by this Court?

(2) Conceding, *arguendo*, that the order of temporary abstention, pending action in the State courts for the construction and determination of the validity of a State statute, should have been made by a three-judge District Court, and was, in fact, extra-jurisdictionally made by a one-judge District Court, must this Court compel literal adherence to the procedural requirements as to the proper tribunal pending action in the State courts?

(3) Did the single-judge District Court have jurisdiction to enter the order of abstention and to retain jurisdiction, pending State court action to be commenced and prosecuted to final judgment, as part of the single-judge District Court's function in passing upon a substantial question which necessarily had to be passed upon to determine the existence of a question under the Federal Constitution?

Statutes Involved

Involved in this application are:

28 U. S. C. §§ 1254(1), 1651(a), 2281 and 2284.[1]

Statement

The merits of the instant controversy are not now before this Court; only a procedural question is presented.

Of relevance to the questions presented is the fact that by the complaint herein the petitioner seeks a declaratory judgment determining that certain provisions of New York statutory law, as applied to the petitioner, are violative of the Federal Constitution and are violative of certain Federal statutes and regulations which are assertedly exclusive and pre-emptive in character. The petitioner also seeks a preliminary and permanent injunction of enforcement of the State statutes by the respondents (State officers) against the petitioner (App. to Petition, pp. 13a-14a).

The petitioner applied for the convening of a three-judge District Court under 28 U. S. C. § 2281 and thereafter formally moved for the convening of that Court (App. to

[1] The pertinent provisions of the foregoing are set forth in the Appendix to this brief.

Petition, pp. 32a-34a). The respondents cross-moved for a dismissal of the complaint on the grounds:

(a) No actual controversy is presented;

(b) No cause of action is stated;

(c) No real or substantial Federal question is presented;

(d) The State courts afford a plain, speedy and efficient remedy and the construction of State statutes should first be determined by the State courts;

(e) The State statutes attacked by the petitioner are not unconstitutional;

(f) The District Court lacks jurisdiction over the subject matter because the complaint fails to show that petitioner has been deprived of any right secured by the Constitution of the United States or by any Act of Congress providing for equal rights of all citizens or of all persons within the jurisdiction of the United States (App. to Petition, pp. 42a-43a).

On November 4, 1960 the District Court (Bicks, J.) denied the petitioner's motion for a three-judge Court and held that the threshold issue was whether the Federal Court should accept jurisdiction at this time since the issues have never been presented to or passed upon by the State courts. The Court concluded that, although substantive issues raised in the complaint may not be considered by the judge to whom application is made, it has the power to retain jurisdiction pending State court adjudication where, as here, there is insufficient basis to support intervention by a Federal court of equity (App. to Petition, pp. 50a-55a). The Court did not dispose of the respondents' cross-motion to dismiss the complaint.

The petitioner appealed to the Court of Appeals, Second Circuit, from the determination and order of the District Court (App. to Petition, p. 56a).

Thereafter, while the appeal was pending, the respondents (not as part of the procedure in the instant proceeding, but as the initiating step in an independent investigation of the petitioner's operation) issued a subpoena to examine the petitioner (App. to Petition, pp. 69a-70a).

The petitioner moved in the action for an order:

(a) To quash the subpoena;

(b) To restrain the respondents from harassing the petitioner pending its appeal. The petitioner also renewed its application for the convening of a three-judge District Court (App. to Petition, pp. 57a-58a).

On December 28, 1960 the District Court (Dimock, J.) determined as follows:

(a) Refused to quash the subpoena, but restrained the respondents, pending the appeal to the Court of Appeals, from using the information thereby obtained to interfere with petitioner's operation;

(b) Did not pass upon the renewal of the request for the convening of a three-judge District Court (App. to Petition, pp. 88a-92a).

The petitioner appealed to the Court of Appeals, Second Circuit, from the decision and order of Judge Dimock (App. to Petition, p. 96a).

The respondents moved in the Court of Appeals to dismiss both appeals on the grounds that the orders appealed from were not final decisions and that they were not inter-

locutory orders refusing an injunction (App. to Petition, pp. 97a-100a).

The Court of Appeals, Second Circuit, by a divided Court, granted the motions to dismiss on April 14, 1961 (App. to Petition, p. 116a). The Court (opinion by WATERMAN, J.) disagreed with the respondents that the order of Judge BICKS was not final and hence unappealable. However, they held that the order had the effect of dismissing the complaint.

Since the complaint challenged the constitutionality, under the Federal Constitution, of a State statute and challenged it because of the way that the statute was being applied, it was clear that a three-judge District Court should have been convened. This is the tribunal which deals with constitutional challenges to State activity. If the District Court fails to convene the statutory court and dismisses the complaint the remedy is by writ of mandamus from the Supreme Court.

Before ordering a three-judge court, the District Court does have jurisdiction to determine the existence of a substantial federal question and this question is properly reviewable by the Court of Appeals. But the different question of abstention, pending prior determination by the State courts, is only within the jurisdiction of a three-judge court and this is not reviewable by the Court of Appeals.

Having held that Judge BICKS had no jurisdiction to make the determination which he made, the Court of Appeals decided that it, too, had no jurisdiction to entertain the appeal. Since a three-judge court should have been convened, the Court of Appeals dismissed the appeal. The Court reached the same conclusion on the appeal from

the decision of Judge DIMOCK (App. to Petition, pp. 103a-110a)[2].

Thereafter the petitioner renewed its motion in the District Court for the convening of a three-judge District Court (App. to Petition, pp. 117a-119a), which motion was denied by the Court (CASHIN, J.). The Court stated that the statement in the Court of Appeals' decision as to a three-judge District Court was pure *dictum* and that, since the orders of Judges BICKS and DIMOCK were undisturbed, he was bound by those orders as the law of the case. He suggested reargument before Judge BICKS or application to this Court for a writ of mandamus (App. to Petition, pp. 130a-135a).

Subsequently the petitioner moved the Court of Appeals, Second Circuit, for the recall, clarification and amendment of its prior mandate, but the Court denied the motion without opinion (App. to Petition, pp. 146a-147a).

ARGUMENT

POINT I

Petition for certiorari should be denied either because both Courts below were without jurisdiction, or because, jurisdiction being present, abstention could be ordered by a single-judge District Court.

A. If neither the one-judge District Court nor the Court of Appeals had jurisdiction, a petition for certiorari to this Court does not lie.

The petitioner, in its complaint herein, seeks to restrain the respondents from enforcing certain State statutes

[2] Dissenting opinion of Lumbard, C. J. (App. to Petition, pp. 111a-115a).

against it. It is conceded that, if the only question involved herein were the constitutionality of the State statutes under the Federal Constitution, the District Court would have had no choice but to convene a three-judge District Court (28 U. S. Code § 2281). But the premise for this concession is not present in this case. Constitutionality cannot be determined without a prior construction of the State statutes. State judicial construction in such cases is, of course, the governing principle and is binding upon both the three-judge District Court and this Court (*Saltonstall* v. *Saltonstall*, 276 U. S. 260, 270 [1928]).

In 28 U. S. C. § 2284 it is provided that the three-judge District Court may order its proceedings held in abeyance during the prosecution to final judgment of a *pending* action in the State courts for the construction and determination of the validity of the State statutes. In the instant case there is no pending State action.

Assuming, *arguendo*, however, that the question of abstention was in the exclusive jurisdiction, in the first instance, of a three-judge District Court, as was held herein by the Court of Appeals, citing *Alabama Public Service Comm.* v. *Southern Ry.*, 341 U. S. 341, 350 (1951), in support of the statement, and *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 252 F. 2d 317, 320 (6th Cir. 1958), to the contrary,[3] it would follow, as the Court of Appeals held, that the single-judge District Court was without jurisdiction to enter the order of abstention. It would also follow that the Court of Appeals, too, under such circumstances, would be without jurisdiction to entertain an appeal from such order and would be constrained to dismiss the appeal. That is exactly what the Court of Ap-

[3] App. to Petition, p. 108a.

peals held and did upon the authority of *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10, 16 (1930).

A petition to this Court for certiorari is the very height of futility, because in the *Stratton* case this Court held that if an order of a one-judge District Court, failing to convene a three-judge District Court, is appealed to a Court of Appeals, which fails to correct the jurisdictional error, and review is then sought in this Court of the decision of the Court of Appeals, this Court will reverse the decree of the Court of Appeals and remand the case to that Court with directions to dismiss the appeal for want of jurisdiction. That, however, is exactly what the Court of Appeals has already done.

B. The single-judge District Court did have jurisdiction to enter the order of abstention in the instant case.

As has already been stated, this case does not involve solely the question of constitutionality, but involves also the preliminary construction of the State statutes, as to which State judicial pronouncement must control. On this preliminary question we have only an opinion of the Attorney General of the State of New York (App. to Petition, pp. 21a-24a). No State action is pending to construe or test the validity of the State statutes. Since there must be State action pending to vest a three-judge District Court, under 28 U. S. C. § 2284, with exclusive jurisdiction to consider the question of abstention, it necessarily follows that a one-judge District Court, under the conditions here existing, has jurisdiction to enter any order bearing upon the preliminary question of the existence of a substantial federal question.

Obviously, the one-judge Court cannot pass upon this question in the absence of a preliminary construction of

the State statutes. Therefore, abstention, pending construction by the State courts, is an incident to the performance of the one-judge Court's conceded jurisdiction to determine whether there exists a substantial question under the Federal Constitution. See *Louisiana Power and Light Co.* v. *City of Thibodaux*, 360 U. S. 25 (1959), in which it was held that the District Court (a one-judge Court) properly exercised the power it had to stay proceedings pending a prompt State court construction of a State statute of dubious meaning.

POINT II

The motion for leave to file a petition for a writ of mandamus directing the convening of a three-judge District Court should be denied by reason of the fact that the cause has not as yet reached the stage where constitutionality is the sole question and because, on the assumption that it is within the exclusive prerogative of the three-judge District Court to order abstention, this Court should nevertheless not disturb the status quo at this time. A three-judge District Court can be convened after a State judicial determination has been rendered without prejudice to the rights of the petitioner.

A. The single-judge District Court did have jurisdiction to pass upon all questions preliminary to the question of constitutionality, among which was the question of power to order abstention and to retain jurisdiction, pending the construction of the State statutes by the State courts, in order to determine whether there did exist, in fact, a substantial question under the Federal Constitution.

The same argument which has been advanced under Point I, subd. B, of this brief, in opposition to the petition

for certiorari, applies with equal cogency to the motion for leave to file a petition for a writ of mandamus.

B. Assuming, *arguendo*, that the one-judge District Court did not have jurisdiction to enter the order of abstention, since there is no prejudice to the petitioner as a result of the failure at this time to convene the three-judge District Court, this Court will not now disturb the *status quo*.

Almost identical with the situation in the case at bar was *Green* v. *Clancy*, 350 U. S. 910 (1955). In the cited case action was brought to enjoin certain State officers from enforcing a State statute against the petitioner. Petitioner moved for the convening of a three-judge District Court which was denied by the one-judge District Court. The respondents' cross motion to dismiss the complaint on the grounds that a substantial federal question was not presented, that a plain, speedy and efficient remedy was available in the New York courts, and that construction of the State statute should first be determined by the New York courts, was granted by the one-judge District Court. On the basis of the foregoing this Court denied a motion for leave to file a petition for writs of prohibition and mandamus.

It would seem that there is even more impelling reason in the case at bar for a denial of the motion. In the cited case the complaint was actually dismissed. In the case at bar, even though the Court of Appeals said that the order of Judge Bicks had the *effect* of dismissing the complaint, the fact is that it did not do so. Jurisdiction was retained pending State court construction of the State statutes.

Action in the State courts need not be indefinitely postponed. Petitioner is not at the mercy of the respondents'

decision to proceed or not to proceed in the State courts. The petitioner, itself, can precipitate such action. The petitioner has adequate remedies in the courts of the State of New York by way of action for declaratory judgment, proceeding under Article 78 of New York's Civil Practice Act, and other appropriate actions and proceedings (*New York Foreign Trade Zone Operators, Inc.* v. *State Liquor Authority*, 285 N. Y. 272, 276-277, 34 N. E. 2d 316 [1941]; *Dun & Bradstreet, Inc.* v. *City of New York*, 276 N. Y. 198, 206, 11 N. E. 2d 728 [1937]). Such modes of relief have been held adequate by this Court (*Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101, 106 [1944]; *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 333-334 [1943]).[4]

Aside from the foregoing it must be observed that since the District Court has retained jurisdiction of the instant cause, the petitioner has not been deprived of such Federal relief as it may be found entitled to to supplement the ultimate determination of the State courts (*Burford* v. *Sun Oil Co.*, *supra*, at page 334).

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[4] The petitioner's objection that State action is inadequate because of the statutory limitation of a stay "for a period not exceeding thirty days" (Alcoholic Beverage Control Law, § 121) is without merit because the District Court, whether one-judge or three-judge, may nevertheless restrain the respondents as an incident of its retention of jurisdiction pending State adjudication of the merits of the case.

CONCLUSION

The petition for a writ of certiorari and the motion for leave to file a petition for a writ of mandamus should be denied.

Dated: Albany, New York, June 26, 1961.

Respectfully submitted,

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APPENDIX

28 U. S. C. § 1254(1)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *."

28 U. S. C. § 1651(a)

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U. S. C. § 2281

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

28 U. S. C. § 2284

"* * *

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State."

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Petitioner,

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I

The brief of New York's Attorney General ignores many basic factors which, in our view, are controlling in fact and law and render his arguments academic, irrespective of their being also unsound.

These basic factors are:

(1) The petitioner's sanction, occupation and property rights derive from the United States,—not from New York.

They are a federal creation, established and vested by the Federal Tariff Act of 1930, the Regulations thereunder and the Internal Revenue Code, in implementation of a federal program and policy in the national interest (2a-6a).

The Treasury Department, Bureau of Customs, "has approved plaintiff's procedures and has ruled that plaintiff's business constitutes the exportation of merchandise within the meaning of Section 311 of the Tariff Act of 1930, 19 U. S. C. §1311" (131a).

Hence, since the *res* and its factual and legal substance are essentially, and indeed exclusively, *federal*, the federal court should proceed at once as against the civil and penal outlawry thereof by New York's Attorney General and Liquor Authority. (Complaint, pars. 7, 8, 12; our preceding brief, pp. 5, 22-5; 28 U. S. C. §§1331, 1337, 2281, 2284; *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, 386, 391-2; *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73, 85-6.)

(2) This federal legislation is avowedly an exercise of the federal government's exclusive power over foreign commerce and exports and imports.

It also is inherently and designedly *preemptive*,—operative independently of state action and with immunity from state interference.

Hence, there was no occasion, propriety or relevancy for first submitting to New York courts the nullifying declarations and actions of New York's Attorney General and Liquor Authority in professed enforcement of the State's civil and penal laws. (Our brief, pp. 22-5.)

(3) The complaint states claims for relief under 28 U. S. C., sections 1331 and 1337 conferring original jurisdiction on the district court (composed of one judge) over "any civil action or proceeding arising under any Act of Congress regulating commerce"; and also under sections 2281-4 conferring jurisdiction on the district court (composed of three judges) where the constitutionality of state action is challenged (11a-14a).

The petitioner is entitled to such relief as the facts warrant. (F. R. C. P., Rule 54c.)

Judges Bicks and Dimock and the Court of Appeals refused any exercise of jurisdiction unde any of these sections, notwithstanding that imminent irreparable damage to petitioner's federal property rights was obvious and admitted, and no state court action was pending. As said by the Court of Appeals (104a, 106a):

> "Judge Bicks • • • in effect granted defendants' motion to dismiss. • • • There was nothing left to be done in the federal courts because the action there had been for all intents and purposes concluded. • • • However, the order of Judge Bicks had the effect of dismissing a complaint • • •."

In consequence the Court of Appeals held (105a) that the "appellees' argument that this (Judge Bicks') order was not final and hence unappealable under 28 U. S. C. §§1291, 1292 is not well taken."

(4) The doctrine of "abstention" could in no event have any application where, as here, the New York courts had already decided (with affirmance by this Supreme Court) the precise underlying issue here, to wit, that the

New York Alcoholic Beverage Control Law is inapplicable or "inoperative" if applied to sales of liquor under United States Custom Bond, regulation and supervision, pursuant to Section 311 of the Tariff Act of 1930, for export in foreign commerce; and that "international transactions in alcoholic beverages" "would be beyond the regulatory powers of the State Liquor Authority". (Our preceding brief, p. 26; and decisions there cited.)

This fact negatives the statement in the Attorney General's brief (p. 9) that on the construction of the state statutes "we have only an opinion of the Attorney General of the State".

Remission to the state courts is inappropriate where the state courts have already given "an authoritative interpretation of the local law." (*Hillsborough* v. *Cromwell*, 326 U. S. 620, 629.)

Particularly is this true where, as here, the petitioner's federal property rights are threatened by a state authority with annihilation under state civil and penal laws, and the state authority is, as here, proceeding by subpoena *duces tecum* to exercise and enforce its claims of power and is interdicting the petitioner's suppliers under the federal law (6a, 7a, 51a, 66a, 76a, 78a-81a).

(5) Immediate annihilation of the petitioner's federal business, valued in excess of $1,000,000, is the purpose and the pending triple procedure of the Liquor Authority, aimed at outlawry of the petitioner, its suppliers and its Idlewild leasehold from the Port Authority (7a, 8a, 51a, 76a, 78a, 80a, 91a).

II

A predicate of the Attorney General's brief (pp. 9, 10) is that the presence of a substantial constitutional question can only be determined by awaiting final decision in the state courts.

This is not realistic here. Judge Dimock expressed the obvious when he said (91a):

> "Plaintiff certainly raises a serious legal issue when it states that what New York is regarding as unlawful has been ruled by the United States to be lawful foreign commerce."

For like reason the Court of Appeals held that "a three-judge district court should have been convened" (109a).

III

A second predicate in the Attorney General's brief (p. 10) is that since (as he claims) a one-judge district court has "conceded jurisdiction to determine whether there exists a substantial question under the Federal Constitution," "abstention pending construction by the State courts, is an incident to the performance" of such one-judge jurisdiction.

But the Court of Appeals expressly and correctly held the precise opposite, to wit, that (108a)

> "the determination of whether a federal court ought to abstain is a determination that may only be made in the first instance by a three-judge district court."

Hence, added the Court of Appeals (108a): "Judge Bicks had no jurisdiction to proceed as he did," and in consequence under *Stratton* his order was not appealable to that Court.

On the other hand, the above contention by the Attorney General necessarily leads to the conclusion that Judge Bicks *did have jurisdiction* to do what he did, and that in consequence his refusal to exercise jurisdiction and his refusal of the temporary injunction requested *were appealable* to the Court of Appeals under 28 U. S. C. §§1291, 1292.

The Attorney General cannot have it both ways.

IV

A third predicate in the Attorney General's brief is (pp. 8, 9) that "there must be State action pending to vest a three-judge District Court, under 28 U. S. C. §2284, with exclusive jurisdiction to consider the question of abstention."

Sections 2281 and 2284 contain no such requirement. On the contrary, they expressly include for jurisdictional purposes "the action of any officer" of the state or an "order" of its administrative board or commission.

Nor do sections 1331 and 1337, U. S. C. contain such a requirement.

His brief refers (p. 8) to the power of the three-judge court under section 2284(5) to stay temporarily its own further proceeding where an outstanding state court "stay" of enforcement already exists. Actually, this provision predicates the very opposite of conditioning federal jurisdiction of a federal suit upon prior pendency of a state court suit.

V

Still another predicate in the Attorney General's brief is (p. 12, footnote) that inadequacy of any state remedy is beside the point

> "because the District Court, whether one-judge or three-judge, may nevertheless restrain the respondents as an incident of its retention of jurisdiction pending State adjudication of the merits of the case."

One effective comment is that Judge Bicks did *not* restrain the Liquor Authority pending state court adjudication—notwithstanding the pleading and his own finding of immediate irreparable damage (7a, 8a, 51a). Judge Dimock expressly refused just such a restraint (89a).

Moreover, the Court of Appeals held that just such a restraint was "properly issuable only by a three-judge district court" (110a).

VI

The Attorney General's brief argues in a circle, and thereby arrives at a conclusion which would paralyze all action under sections 2281-4 until prior final determination by the state courts. To quote (p. 8):

> "It is conceded that, if the only question involved herein were the constitutionality of the State statutes under the Federal Constitution, the District Court would have had no choice but to convene a three-judge District Court (28 U. S. Code §2281). But the premise for this concession is not present in this case. Constitutionality cannot be determined without a prior

construction of the State statutes. State judicial construction in such cases is, of course, the governing principle and is binding upon both the three-judge District Court and this Court (*Saltonstall* v. *Saltonstall*, 276 U. S. 260, 270 [1928])."

The only authority cited for this circular contention, which would certainly hamstring sections 2281-4, is *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 270 (1928),—a case which was not an action under Sections 1337 or 2281-4 or even one originating in a federal court.

This Court has conclusively held that where the action is not only on federal constitutional grounds but also includes "a non-constitutional federal issue which depends upon the decision on an underlying issue of state law," "the case is one that is *required*" "to be heard and determined by a district court of three judges". (*Propper* v. *Clark*, 337 U. S. 472, 490; *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73, 85.)

VII

The Court of Appeals twice characterized its position and decision as "anomalous" (108a), and its results as "unhappy ones" (110a) and as creating "obvious difficulties" (106a).

For over a year and at vast expense, the petitioner has found itself entangled from the outset in a thicket of diverse judicial views on "only a procedural question",—to quote the Attorney General's brief, which thereupon adds a separate view of its own.

We submit that for the protection of the petitioner, the certainty of law, the interests of justice, and the vindication of federal preemptive legislation, this Supreme Court should interpose its supervisory jurisdiction.

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Office-Supreme Court, U.S.
FILED
NOV 18 1961
JOHN F. DAVIS, CLERK

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Respondents.

BRIEF FOR PETITIONER ON CERTIORARI AND FOR WRIT OF MANDAMUS

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Argument

POINT I—Since, with the express sanction of the U. S. Treasury Department, the petitioner was exercising rights and conducting a business legalized by federal statutes and rules regulative of commerce in furtherance of a national policy and in a field where the national power was exclusive and plenary, the petitioner had a federal right to protection of such sanctioned rights and business in the federal courts and could not lawfully be relegated to the uncertainties and restrictions of some futural suit in the courts of a state which had no sovereignty in the area wherein Congress had enacted and wherein state action was expressly prohibited by the Commerce, Import-Export and Supremacy Clauses 25

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POINT II—Moreover, the doctrine of abstention is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it.

Here the facts, so far from being those requisite to the exception, exclude it 31

POINT III—An unbroken line of decisions in this and other federal courts uphold the right of this petitioner, by reason of the foregoing facts and principles, to an immediate and full exercise of the original jurisdiction of the district court 33

POINT IV—The decisions cited by Judge Bicks (52a-55a) are, we submit, wholly inapposite in their facts and rationales 38

POINT V—Furthermore, in abstaining the exercise of an acknowledged jurisdiction, pending some future state court action, Judge Bicks erred in his own reasoning by overlooking that the New York appellate courts had repeatedly held the New York Beverage Control Law inapplicable or "inoperative" as against the very thing here involved, namely, the export of liquor under Section 311 of the Tariff Act of 1930 and the Internal Revenue Code 40

POINT VI—Furthermore, even if, *arguendo*, the state remedies afforded by Alcoholic Beverage Control Law §121 were deemed available to the petitioner, they are by their very terms inadequate for the petitioner's protection and have been so held judicially 43

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POINT VII—Even assuming *arguendo* that Judges Bicks, Dimock and Cashin lawfully decreed abstention, nevertheless they should not have left the petitioner naked to the current lethal assaults upon it by the State Liquor Authority, but should have made their own reservation of jurisdiction meaningful by enjoining those assaults pending reasonably expeditious outcome in some future suit in the state courts. The refusal of Judges Bicks and Dimock to do so was appealable to the Court of Appeals 45

POINT VIII—Even if, notwithstanding the allegations of the complaint and affidavits, the doctrine of abstention could be considered, consideration of it was exclusively for the requested three-judge district court pursuant to 28 U. S. C. §§2281, 2284 46

POINT IX—In any event the Court of Appeals erred, we submit, in not vacating the orders of Judge Bicks and Judge Dimock, which it held to have been made without jurisdiction, and in not remitting the case for "such further proceedings to be had as may be just under the circumstances." 28 U. S. C. §2106 48

POINT X—Assuming for argument's sake that the petitioner was not entitled to the convening of a three-judge court, nevertheless it was entitled for its adequate protection to the exercise of the original jurisdiction of the district court under 28 U. S. C., Sections 1331 and 1337.

The refusals of the single-judge district court to proceed with the exercise of that jurisdiction and to grant the petitioner protection by temporary injunction were errors appealable to the Court of Appeals; and the action of the Court of Appeals in dismissing the appeals for lack of jurisdiction was further error 51

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IN THE

Supreme Court of the United States

October Term, 1961

No. 138

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,
Respondents.

Misc. 180

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

HONORABLE ALEXANDER BICKS, HONORABLE EDWARD J. DIMOCK, HONORABLE JOHN M. CASHIN, JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondents.

BRIEF FOR PETITIONER ON CERTIORARI AND FOR WRIT OF MANDAMUS

Opinions Below

All opinions in the courts below appear in full in the Record at the pages hereinafter designated.

Judge Bicks' opinion and order of November 4, 1960, (49a)* are reported at 188 F. Supp. 434.

Judge Dimock's subsequent opinion of December 28, 1960, (88a) and order (93a) have not been reported.

The majority and dissenting opinions of the Court of Appeals (103a, 111a), filed April 14, 1961, dismissing Idlewild's appeals from the decisions of Judge Bicks and Judge Dimock, are reported at 289 F. 2d 426. The judgment of the Court of Appeals, dated April 14, 1961, appears at 116a.

Judge Cashin's subsequent opinion and order of May 31, 1961 (130a), are reported at 194 F. Supp. 3.

The order of the Court of Appeals granting a stay pending application for a review by the United States Supreme Court but denying Idlewild's application for clarification appears at 147a, and is not officially reported.

Jurisdiction

The jurisdiction of this Court is invoked as follows:

As to certiorari, the jurisdiction is invoked under 28 U. S. C. §1254(1). The time factors upon which such jurisdiction rests are stated above under "Opinions Below".

As to mandamus, the jurisdiction is invoked under 28 U. S. C. §1651(a). The time factors are the same.

By order entered October 9, 1961, this Court granted the petition for writ of certiorari and for leave to file petition for writ of mandamus.

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* All references followed by a small "a" are to the Record. All references followed by a capital "A" are to the Appendix to the petition for certiorari in this Court.

Constitutional Provisions, Statutes and Regulations

(1) *Federal Constitutional Provisions*

(a) "The Congress shall have Power, * * * 3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes" (Art. I, §8).

(b) "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports" (Art. I, §10).

(c) "This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" (Art. VI).

(d) "The Congress shall have Power, * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." (Art. I, §8.)

(2) *Federal Statutes, Code and Regulations*

The Appendix to the petition for certiorari sets forth the pertinent provisions of the Federal Statutes, Internal Revenue Code and Regulations thereunder, providing for:

(a) a district court of three judges in constitutional cases involving state action. 28 U. S. C. §§2281 and 2284 (1) and (3) (148A);

(b) "original jurisdiction" of the federal district courts in a civil action which "arises under the Constitution, laws,

or treaties of the United States," or "arising under any Act of Congress regulating commerce." 28 U. S. C. §§1331 and 1337 (149A);

(c) appellate jurisdiction of the Circuit Court of Appeals over final orders of the district courts and over interlocutory orders of the district courts refusing injunctions. 28 U. S. C. §§1291 and 1292(a)(1) (149A);

(d) the powers of the federal appellate courts to affirm, modify, vacate, set aside, reverse, or remand. 28 U. S. C. §2106 (150A);

(e) the pertinent substantive provisions of the Federal Tariff Act of 1930. 19 U. S. C. §1311 (17a);

(f) the associated provisions of the Internal Revenue Code. 26 U. S. C. §§5521, 5522, and 5523 (150A-153A);

(g) the applicable U. S. Customs Regulations thereunder. 19 C. F. R., Parts 18 and 19 (154A-185A).

In addition there is involved 28 U. S. C. §2201 providing as follows in actions for declaratory judgment:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

(3) *New York State Statutory Provisions*

Provisions of the New York Alcoholic Beverage Control Law (Consolidated Laws, Ch. 3-B) are reprinted in the Record (30a-33a).

This statute, in permitting "review by courts", contains the mandatory provision (Section 121) "that no stay shall be granted pending the determination of the matter" except "for a period not exceeding thirty days"; and Section 130 makes the illegal selling of alcoholic beverages a misdemeanor punishable by a fine of not less than $200 nor more than $1200 or by imprisonment for not less than thirty days nor more than one year, or both.

The Questions Involved

Introductory

Judge Bicks denied the petitioner's application for a three-judge court, with leave to renew after a state court ruling in an action not then pending. He also refused the petitioner's motion for a temporary injunction (55a).

Judge Dimock held himself bound to follow Judge Bicks, notwithstanding proof of subsequent activities by the State Liquor Authority to shut down the petitioner's business forthwith (89a).

By dismissing the petitioner's appeals from the orders of Judges Bicks and Dimock, the Court of Appeals, according to its own acknowledgments (104a, 106a, 108a, 110a), let stand orders which it decided had been entered without jurisdiction (108a, 110a) but which "had the effect of dismissing a complaint" described by Judge Bicks as seeking "declaratory and injunctive relief" (52a); put the petitioner "effectively out of court", notwithstanding the admitted presence of "a substantial federal question", with "nothing left to be done in the federal courts because

the action there had been for all intents and purposes concluded"; and created the "unhappy" and "anomalous" result of "refusing access to our court to a party who we believe is entitled to relief" (104a, 106a, 108a, 110a).

The Court of Appeals further held that "a three-judge district court should have been convened" (109a), but viewed *Stratton* v. *St. Louis S.W. Ry.*, 282 U. S. 10, as constraining it to rule that, because the district court had lacked jurisdiction to do what it did, the Court of Appeals itself also lacked jurisdiction over all the issues and matters presented by the appeals and was bound to dismiss the appeals *in toto* and without more.

Thereafter, when the petitioner applied to Judge Cashin to convene a three-judge court in accordance with the Court of Appeals' decision that Judges Bicks and Dimock had "had no jurisdiction to proceed as he did" and should have convened a three-judge court (108a, 110a), Judge Cashin held that that part of its decision was mere "dictum", notwithstanding that it was the expressed essential basis for the Court of Appeals' own disclaimer of any appellate jurisdiction; and that the orders of Judges Bicks and Dimock, although declared by the Court of Appeals to have been without jurisdiction, were "still in full force and effect" and "still the law of this case" which he was bound to follow (130a-135a).

All the judges below recognized the immediate irreparable damage which faced the petitioner (51a, 90a, 91a, 104a, 131a).

The Questions

Hence, the common questions which are presented in the two petitions now before this Court are, as somewhat rephrased and separated in order to pin-point subsidiary questions but without change of substance:

(1) Were the petitioner and its established export business, sanctioned and controlled by the United States Government in implementation of its exclusive power over foreign commerce and reciprocity with foreign nations, entitled to the protection of the district court's original jurisdiction against later efforts by representatives of New York to suppress such business as illegal?

Put another way, did the district court abandon its duty by, instead, waving the petitioner into the courts of a sovereignty which had no jurisdiction over the area in which Congress had acted and hence no jurisdiction over the petitioner's federally approved and regulated export business?

(2) Since the undenied allegations of the complaint stated an admittedly "serious" and "substantial federal question" (91a, 104a) as to the legality of attempted State regulation and control of exports contrary to (a) the Foreign Commerce Clause, (b) the Export-Import Clause, (c) the Supremacy Clauses of the Constitution of the United States, (d) the preemptive national policy and provisions of the Tariff Act of 1930, 19 U. S. C. §1311, (e) the regulations thereunder (19 C. F. R. Parts 18 and 19), (f) the associated provisions of the Federal Internal Revenue Code (26 U. S. C. §§5521 and 5522), and (g) the express Ruling of the Treasury Department, Bureau of Customs, approving this petitioner and its business (15a), did Judge Bicks, in not convening a three-judge court, act contrary to the duty imposed and the jurisdiction limited by 28 U. S. C. §§2281 and 2284.

(3) Since the undenied allegations of the complaint also stated a case for declaratory and injunctive relief in protection of the petitioner's property rights created and possessed pursuant to federal statutory policy and sanction in the national interest and regulative of commerce in reciprocity with other nations (2a *et seq.*, 11a-12a), did Judge Bicks in effect deny and, contrary to duty, fail to exercise

the "original jurisdiction" imposed on the district court by 28 U. S. C. §§1331 and 1337 over any action (such as this) arising "under the Constitution, laws, or treaties of the United States" and "under any Act of Congress regulating commerce"? See F. R. C. P., Rules 54(c) and 57.

(4) In denying the petitioner's motions on further affidavits (a) for temporary injunction against the State Liquor Authority's effective threats against the petitioner's suppliers, (b) to quash the Authority's subpoena of the petitioner's records, and (c) to empanel a three-judge court to make the requisite determinations thereon (71a-81a), did Judge Dimock, like Judge Bicks and for the same reasons, act contrary to statutory duty and statutory jurisdiction (88a)?

(5) Since, as above stated (3), the complaint also stated a case arising under federal laws and thereby also invoked the "original jurisdiction" of the one-judge district court, did Judges Bicks and Dimock (a) improperly deny petitioner's application for a temporary injunction to restrain what both recognized as immediate irreparable jeopardy and damage (51a, 91a), and, instead, (b) improperly postpone the petitioner without interim protection to some future ruling of a state court in some future state action not then existing?

(6) Assuming *arguendo* that, under certain circumstances, a one-judge district court may have discretionary power to abstain in deference to a state court test, can such power be lawfully exercised where the *res* is in fact and in law a federally sanctioned implementation of an Act of Congress regulative of foreign commerce in reciprocity with foreign nations, and irreparable injury thereto is imminent, and no state court action is pending?

(7) Did the Court of Appeals err in holding that it was without jurisdiction to review the merits of any of the issues and matters presented by petitioner's appeals from the orders of Judges Bicks and Dimock?

(8) Since, as above stated (3), the complaint also invoked the "original jurisdiction" of the one-judge district court, did the Court of Appeals also act contrary to its statutory jurisdiction and obligation under 28 U. S. C. §§1291 and 1292 and 2106 in dismissing the petitioner's appeals?

(9) Did the Court of Appeals also err in dismissing the appeals *in toto* and without more, instead of vacating the orders of Judges Bicks and Dimock and remanding the case to the district court for "such further proceedings as may be just under the circumstances" (28 U. S. C. §2106)?

(10) Was not the dissenting judge in the Court of Appeals (Lumbard, C.J.) right in his opinion (111a *et seq.*) that, because the orders of Judges Bicks and Dimock were concededly otherwise appealable (108a, 109a, 110a, 111a), the Court of Appeals should "hear the appeals to decide first whether the single-judge district court had jurisdiction" on any ground, and, if it did, should then proceed to consider whether its action accorded with the merits?

(11) Did Judge Cashin erroneously repeat and perpetuate the errors by Judges Bicks and Dimock as to jurisdiction, the convening of a three-judge court and injunctive relief by his holding that their orders were "still in full force and effect" and "still the law of this case" by which he was bound (133a), notwithstanding that the Court of Appeals had declared them to be in excess of jurisdiction and hence nullities?

(12) Was not "abstention" also unlawful or, if discretion could be a factor, an abuse of discretion in view of the fact that the New York courts had uniformly held that the New York Alcoholic Beverage Control Law is inapplicable or "inoperative" if applied to sales of liquor for export in foreign commerce under constant United States Customs Bond, regulation and supervision—the very transactions here involved?

(13) Was not "abstention" also improper in view of the facts that the remedies available to petitioner in the New York courts under the New York Alcoholic Beverage Control Law are, in a case such as this, "inadequate" by their very terms and by the interpretation thereof by the New York Court of Appeals?

(14) Assuming *arguendo* that the petitioner was not entitled to the convening of a three-judge court, was it nevertheless entitled for its adequate protection to the exercise of the original jurisdiction of the district court under 28 U. S. C. §§1331 and 1337?

Statement of the Case

(1) *The Nature of the Case*

This action is for declaratory and injunctive relief and for an adjudication that the Constitution and laws of the United States and federal official action thereunder preclude the action of the New York State Liquor Authority in the professed enforcement and execution of the New York State Alcoholic Beverage Control Law against the petitioner's federally sanctioned export business and in destruction thereof.

Instead of answering, the defendants moved to dismiss the complaint "on the grounds that it fails to state a

claim" and "that the Court lacks jurisdiction over the subject matter" (42a).

Hence the facts pleaded expressly or by fair intendment must be deemed admitted for all present purposes. (F. R. C. P., Rule 8(f).)

No court below granted the motion to dismiss.

Judge Bicks truly said (51a) that the petitioner "faces the prospect of closing its doors, with consequent substantial damage".

Judge Dimock truly said (91a):

> "Plaintiff certainly raises a serious legal issue when it states that what New York is regarding as unlawful has been ruled by the United States to be lawful foreign commerce."

The Court of Appeals thrice held that "a substantial federal question" is thus presented (104a, 107a, 108a).

(2) *Petitioner's Lawful Export Business*

The petitioner, a New York corporation, is engaged in selling United States Customs bonded, tax-free wines and liquors, solely for export, to overseas passengers from premises leased on October 31, 1956, from the New York Port Authority, a bi-State agency organized with the consent of Congress, at Idlewild Airport (2a, 35a-38a, 49a-50a, 90a, 130a-131a).

Each bottle of liquor sold by petitioner remains under continuous United States Customs bond, regulation and supervision from the time it is withdrawn from Class 6 United States Government bonded manufacturing warehouses, and the United States Customs bonded storage warehouses. During the time it is rewarehoused at the petitioner's premises under United States Customs control, and until the bottle is placed aboard the aircraft and delivered to the passenger after arrival at his foreign

destination (3a-5a, 36a). The petitioner is required to account, on United States Customs forms, for each and every bottle (3a, 36a).

The privilege accorded the outgoing passenger to export liquor free of tax and duty here or abroad is reciprocal to the privilege accorded incoming passengers to purchase a limited quantity of liquor in foreign countries for import into the United States free of tax or duty here or abroad, in accordance with reciprocal agreements with foreign governments (5a-6a, 37a).

The obvious purposes of the right, thus granted by the Federal Government, of thus exporting a bottle of liquor tax-free are (1) to encourage foreign commerce, and (2) to promote domestic exports,—a particularly pressing national interest in view of the present crisis in our balance of payments.

The United States Treasury Department, Bureau of Customs, supervises the conduct of petitioner's business and by letter of April 15, 1958 (37a) expressly "approved" and authorized the petitioner's procedure. It has also approved the petitioner's premises, and has prescribed the petitioner's procedures. It has also expressly ruled that the petitioner's business constitutes the exportation of merchandise within the meaning and sanction of §311 of the Tariff Act of 1930, 19 U. S. C. §1311 (15a-20a, 35a-37a, 50a, 131a).

The New York State Tax Commission had also ruled in writing as far back as August 2, 1954, that a business such as the petitioner's which consists of sales of liquor in United States Customs bond withdrawn for export from Class 6 warehouses under federal regulation, is not engaged in a "sale" subject to the New York State Alcoholic Beverage Tax (7a, 26a-27a, 62a).

(3) *The State Liquor Authority's Assertion that the Petitioner's Business is "Illegal" under New York Law*

After this sanction by the Federal Government the petitioner, out of an abundance of caution, inquired of the State Liquor Authority whether its business was subject to the New York State Alcoholic Beverage Control Law. The State Liquor Authority sought and obtained an opinion from the New York State Attorney-General (1960, Op. Atty. Gen., June 30) to the effect that (1) Idlewild's business constituted a "sale" within the meaning of the Alcoholic Beverage Control Law, §3(28), but (2) there is no provision of that Law which would authorize a license for such sales for export, (3) no person can sell alcoholic beverages within New York without a license and (4) hence the petitioner's business "may not be conducted in the State of New York" (21a-24a, 90a, 131a).

Thereupon the State Liquor Authority determined, and by letter dated July 11, 1960, so advised petitioner's counsel (25a), that its business

> "• • • is in conflict with the laws of the State of New York and, therefore, would be illegal."

(4) *The Institution of this Action to Protect the Petitioner's Federal Rights and Business*

The immediate practical effect of this "determination" was to place the petitioner in dire jeopardy and to confront it with the imminent loss of a business valued at over $1,000,000 (8a, 39a). As Judge Bicks found (51a, 188 F. Supp. at p. 436):

> "The New York Importers & Distillers Association circularized its members advising that in view of the position of the Attorney General and of §62 of the Alcoholic Beverage Control Law, they could not legally fill plaintiff's orders. Plaintiff has not since been able to make purchases to meet its requirements and faces

the prospect of closing its doors, with consequent substantial damage."

Furthermore, the petitioner and its officers were threatened by the State Liquor Authority with civil and criminal proceedings (7a, 8a, 39a, 40a).

This action for a declaratory judgment and for temporary and final injunction was accordingly instituted on July 22, 1960. Simultaneously the petitioner moved for a temporary injunction and for a restraining order pending determination thereof (41a). It also moved for the impanelling of a three-judge court pursuant to 28 U. S. C. §§2281 and 2284 (32a).

(5) *The Representations of the State Liquor Authority Before Judge Bicks that the Petitioner's Business was not Threatened by it*

Confronted with the square conflict between their claim of illegality under State Law and the petitioner's federal rights, the State Liquor Authority sought to delay an adjudication. It appeared before Judge Bicks by the Attorney-General of the State of New York and cross-moved to dismiss the complaint on the alleged grounds (among others) that the state courts afforded an "efficient remedy" and that (42a, 75a):

> "The complaint makes no claim that the State Liquor Authority is threatening, directly or indirectly, to take steps to interfere with plaintiff's operations. Since the plaintiff is a non-licensee, there is no real action the State Liquor Authority can take against the plaintiff."

In point of fact both the complaint (7a-12a) and the petitioner's moving affidavit (35a-41a) abundantly alleged factually that such threats were being made and irreparable damage had already begun.

(6) *Judge Bicks' Decision Remitting the Petitioner to the State Courts*

Judge Bicks recognized that the petitioner "faces the prospect of closing its doors, with consequent substantial damage" (51a), but because of what he characterized as the "tentative and hypothetical posture" of the case before him (53a), he decided (55a, 188 F. Supp. 437-8):

> "Although the substantive issues raised in the complaint may not be considered by the judge to whom application under 28 U. S. C. A. §2281 is made, he has the power to retain jurisdiction pending state court adjudication where, as here, there is insufficient basis to support intervention by a federal court of equity. (Citing cases)
>
> "Motion for impanelling of a three-judge court denied, with leave to renew after the state court has ruled."

Judge Bicks' opinion made no mention of 28 U. S. C. §§1331 and 1337 or of the original jurisdiction thereby imposed on the district court in just such a case as this.

He left the petitioner without any protection, temporary or otherwise, notwithstanding that no state court action existed (104a).

(7) *The Petitioner's Appeal and the Immediately Following Retaliation by the State Liquor Authority*

The petitioner promptly appealed Judge Bicks' decision (56a).

Five days later, the State Liquor Authority issued a subpoena *duces tecum* directed to the petitioner and calling for all its records. Notwithstanding its prior representations before Judge Bicks that "since the plaintiff is a non-licensee, there is no real action the State Liquor Authority

can take against the plaintiff" (64a, 67a, 75a), the subpoena expressly required the petitioner to appear and testify concerning its business "*under the license to sell alcoholic beverages issued by the State Liquor Authority*" (69a). (Emphasis supplied.)

Thus, the State Liquor Authority, acting under color of State law, reversed its field and went back on its representation to Judge Bicks that "there is no real action" or "steps to interfere" which it can take against petitioner. Instead, it now sought to cut in ahead of the Court of Appeals and to hale the petitioner before itself for an inquisition as prosecutor, judge and jury to pass upon its own assault upon the petitioner's Federal rights, and to get at the petitioner's list of suppliers, before the Court of Appeals could act (66a-68a, 75a, 76a, 83a, 91a).

Also no more overt interference could there be than the bald threats thereupon made on three occasions by officials of the State Liquor Authority to the several United States Customs bonded interstate truckers who had been making deliveries to the petitioner (76a, 78a-81a). This was a palpable attempt, *vi et armis*, to frustrate the petitioner's resort to the federal courts by immediately choking off its last lifeline of supply from out-of-state sources to which the petitioner had been driven because the State Liquor Authority's prior announced determination of illegality had frightened off its New York suppliers (51a, 131a).

(8) *Judge Dimock's Decision*

Accordingly, the petitioner again moved for a temporary injunction *pendente lite* and for the impanelling of a three-judge court (71a-72a), and also moved to quash the subpoena (57a). These motions came on before Judge Dimock, who held that he had to follow Judge Bicks (89a), but that (91a):

> "Plaintiff is entitled to an injunction against harassment by defendant pending the appeal from the order of Judge Bicks."

Judge Dimock acknowledged (91a):

> "Plaintiff certainly raises a serious legal question when it states that what New York is regarding as unlawful has been ruled by the United States to be lawful foreign commerce."

(9) *The Court of Appeals' Decision*

A majority of the Court of Appeals, Chief Judge Lumbard dissenting, held that, since "a substantial federal question existed" (104a, 107a, 108a), "a three-judge district court should have been convened" by Judge Bicks and Judge Dimock to decide, *inter alia*, whether to apply the so-called doctrine of "abstention" (109a, 110a); but that, although the orders of both judges were held to be otherwise appealable (105a-106a, 109a, 111a), nevertheless since Judge Bicks and Judge Dimock "had no jurisdiction to proceed, as he did, • • • we must conclude from *Stratton* (282 U. S. 10) that we have no jurisdiction to entertain an appeal" from either decision (108a, 110a).

The petitioner's appeals were thereupon "dismissed" without remand (116a).

The majority conceded "this result leaves us in a somewhat anomalous position" (108a), and concluded (110a):

> "The results we reach are unhappy ones. We a[re] refusing access to our court to a party who we belie[ve] is entitled to relief."

The petitioner's statutory right to the exercise of original jurisdiction by the district court with a single judge under 28 U. S. C. §§1331 and 1337 was again at least impliedly overruled.

In his dissenting opinion Chief Judge Lumbard took issue, saying (114a-115a):

"The majority's view, however, imposes on the federal courts a procedure of piecemeal review whereby a court of appeals is always forced to stay its hand whenever an appellant or appellee argues to it that the decision below should have been made by a three-judge court. No matter how worthless such a claim may be, we would not be able to dispose of it on an appeal from a final order but would have to await a decision on a petition for mandamus in the Supreme Court. Only after the Supreme Court decided the jurisdictional question might we be permitted to consider the merits, and the merits would not be ripe for Supreme Court review until we had passed upon them on remand. I cannot believe that the authority of the Supreme Court over three-judge tribunals was intended to extend so far as to preclude us from deciding the jurisdictional issue when a district judge enters an order that is otherwise appealable under 28 U. S. C. §§1291, 1292, and thereby to impose on the parties a procedure calling for separate appellate consideration of the jurisdictional and substantive questions."

(10) *Judge Cashin's Decision*

The petitioner promptly sought to comply with the declarations of the Court of Appeals and moved again in the District Court to convene a three-judge district court and for injunctive relief, in accordance with the procedure suggested by this Court in *Stratton* v. *St. Louis S. W. Ry. Co.*, 282 U. S. 10, 18, and by Mr. Justice Stewart in *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 6 Cir., 252 F. 2d 317, 319.

Judge Cashin denied these applications. He characterized as "dictum" the holding by the Court of Appeals that "a three-judge district court should have been convened" (132a); and, overlooking the very *ratio decidendi* of that Court, he followed as "the law of this case" and

"as still in full force and effect" (133a) the very refusals by Judge Bicks and Judge Dimock to convene a three-judge district court which the Court of Appeals had just held to be erroneous, without jurisdiction and hence nullities.

(11) *The Court of Appeals' Refusal to Recall and Clarify Its Judgment*

In a final effort to avoid burdening this Supreme Court, counsel and the litigants with the expenditure of time, money and effort entailed by these conflicting judicial expressions, the petitioner moved in the Court of Appeals for an order clarifying its judgment of dismissal so as to test Judge Cashin's characterization as "dictum," and to remand this case to the District Court for "such further proceedings * * * as may be just under the circumstances," as authorized by 28 U. S. C. §2106.

The Court of Appeals' denial was without opinion (147a).

Summary of Argument

(1) The area of foreign commerce is reserved by the Commerce Clause, the Import-Export Clause and the Supremacy Clauses exclusively for the National Government; and the preemptive nature of legislation by Congress within that area is part of the total constitutional principle which requires "the supremacy of the national power in the field of foreign affairs". (*Hines* v. *Davidowitz*, 312 U. S. 52, 62-4.)

Acting within that exclusive area, Congress enacted Section 311 of the Tariff Act of 1930 (19 U.S.C. § 1311) and Sections 5521 and 5522 of the Internal Revenue Code (26 U.S.C.), and authorized the Secretary of the Treasury to prescribe regulations for carrying out the provisions and

policy thereof for all articles to "be made and manufactured in bonded warehouses" and "intended for exportation" (17a). Such congressional legislation and regulations were preemptive as an exercise of the supreme and exclusive national power under the foregoing Clauses of the Constitution in the area of foreign commerce. (*McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414; *Hood & Sons* v. *DuMond*, 336 U.S. 525, 535-8; *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230; *Pennsylvania* v. *Nelson*, 350 U.S. 497, 504.)

(2) As implementation of such exclusive and preemptive national legislation and its purposes for promoting our foreign commerce and reciprocal commercial relations with foreign countries and governments, the petitioner's business was expressly approved and sanctioned by the United States Treasury Department, Bureau of Customs, on April 15, 1958, as "an exportation of the merchandise within the meaning of section 311 of the tariff act", and was thereafter continuously under supervision, regulation and control by the Bureau of Customs (2a-6a, 15a, 16a, 35a-37a, 50a).

The right to engage in foreign commerce under Section 311 of the Tariff Act and Sections 5521 and 5522 of the Internal Revenue Code is not the gift of a state, and a state cannot regulate it or restrain or forbid it. In such an area, a state has no jurisdiction. (Decisions *supra*.)

In consequence, the petitioner had a right originating in and conferred by the foregoing Clauses of the Constitution and the foregoing federal legislation and regulations to the exercise of "the original jurisdiction" imposed upon the federal district court in cases arising "under the Constitution, laws, or treaties of the United States" and "under any Act of Congress regulating commerce" (28 U.S.C. §§1331 and 1337). Such original jurisdiction, so imposed, is itself part of the exercise of the supreme and exclusive national power in the area of foreign commerce and reciprocal relations with foreign governments. (*All American*

Airways v. *Village of Cedarhurst*, 201 F. 2d 273, 277; *Hines* v. *Davidowitz*, 312 U.S. 52; and decisions cited under Point III, *post*.)

Such original jurisdiction in the district court carries with it full judicial powers in "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and all Treaties made, or which shall be made, under their Authority." (Constitution, Art. III, Sec. 2). Included therein are powers to grant declaratory judgments, interlocutory injunctions, restraining orders and such other relief as the facts set forth in the statement of claim and accompanying proof may warrant. (F.R.C.P., Rules 1, 54(c) and 57.)

(3) In the present case, all courts and judges below recognized the immediate irreparable damage — indeed imminent extinction—which confronted petitioner from the defendants' assertions of illegality, threats against the petitioner and its domestic and interstate suppliers, and threats of civil and criminal proceedings (7a, 8a, 38a, 39a, 51a, 90a, 91a, 104a, 131a).

The facts presented to Judges Bicks, Dimock and Cashin by complaint and affidavits showed a present justiciable controversy involving present irreparable damage. (*Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 85; *California Commission* v. *United States*, 355 U.S. 534, 536-9; *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U.S. 77, 83-4.)

(4) Power to abstain from exercise by a district court of acknowledged jurisdiction does not exist and is not lawfully exercised where the plaintiffs' rights derive from and are the creatures of an exclusive and preemptive national plan and exercise of national power under the Commerce, Import-Export and Supremacy Clauses of the Constitution and federal statutes and regulations thereunder. (*Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230; and cases cited under Point III, *post*.) *A fortiori* is this true where no state

court suit is presently existing, and irreparable damage is presently occurring.

Abstention for remission to a state sovereignty which has no jurisdiction over the rights so derived and so created is a logical and legal absurdity.

(5) Also abstention for remission to courts of a state which have already held through its highest tribunal that the state's Alcoholic Beverage Control Law has and can have no application to federal rights in foreign commerce, derived from and created by the exclusive and preemptive exercise of national power, as in the case of this petitioner. (*Matter of Gulf Oil Corp.* v. *McGoldrick*, 256 App. Div. 207, 209, 210, 212; aff'd 281 N. Y. 647; aff'd 309 U. S. 414, 427, 429; *During* v. *Valente*, 267 App. Div. 383, 385-6; *Rosenblum* v. *Frankel*, 279 App. Div. 66, 68.)

(6) Also such abstention is never proper where relief obtainable under the state statute involved is inadequate. In the present case, the New York Alcoholic Beverage Control Law, Section 121, on which the Liquor Authority relied before Judge Bicks (64a-65a), provides the sole method for judicial review of action by that Authority, but expressly limits any judicial stay therein "pending the determination of the matter" "for a period not exceeding thirty days". (New York Consolidated Laws, ch. 3-B.) *Matter of Yacht Club Catering* v. *Bruckman*, 276 N. Y. 44, holds that this period is mandatory, regardless of "irreparable damage to the individual" (276 N. Y. at p. 48). In accord: *Barcus* v. *O'Connell*, 281 App. Div. 1064. The state remedies are therefore inadequate. *Burach* v. *State Liquor Authority of the State of New York*, 160 F. Supp. 161, 165 (E. D. N. Y. 1958).

(7) Even if, notwithstanding the allegations of complaint and affidavits, the doctrine of abstention could be considered, consideration of it was exclusively for the re-

quested three-judge district court. 28 U. S. C. §2284(5). Since irreparable damage was immediately occurring, the orders of Judges Bicks and Dimock for total abstention in the exercise of admitted jurisdiction, pending some state court suit not presently existing, were in fact and in law denials of interim protection,—a subject requiring the convening of a three-judge court. 28 U. S. C. §2284(5).

On the other hand, if the refusal to convene a three-judge court could for any reason have been lawful in this case, then the effectual denial of interim protection by abstention without such protection pending some future state court suit, would be a denial of the petitioner's right to the exercise of a single-judge court's original jurisdiction under 28 U. S. C. §§1331, 1337; and also such denial would be a refusal of the petitioner's application for interim protection appealable as of right to the U. S. Court of Appeals under 28 U. S. C. §1292(a)(1). (*Hines* v. *Davidowitz*, 312 U. S. 52, 62, footnote; *General Electric Co.* v. *Callahan*, 294 F. 2d 60, 65.)

(8) The majority in the Court of Appeals went contrary to that Court's statutory jurisdiction and obligation under 28 U. S. C. §§1291, 1292 and 2106, in holding that it had "no jurisdiction" to entertain the petitioner's appeals from the denials of its applications for a three-judge court and for a temporary injunction. (*General Electric Company* v. *Callahan*, 294 F. 2d 60, 65.)

The majority in the Court of Appeals also erred in dismissing the petitioner's appeals *in toto* and without more, instead of vacating the orders of Judges Bicks and Dimock and remanding the case for "such further proceedings to be had as may be just under the circumstances" (28 U. S. C. §2106). (*Phillips* v. *United States*, 312 U. S. 246, 248, 254; *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386, 392; *Gulla* v. *Interstate Natural Gas Co.*, 292 U. S. 16, 19.)

Assuming *arguendo* that the single-judge district court rightly reserved jurisdiction pending final state court ac-

tion, the majority in the Court of Appeals erred in holding itself to be without jurisdiction to entertain the petitioner's appeal from the denial of a protective injunction pending a final state court adjudication. 28 U.S.C. §1291(a) (1).

(9) Even assuming *arguendo* that the petitioner was not entitled to the convening of a three-judge court, nevertheless the petitioner was entitled for its adequate protection to the exercise of the original jurisdiction of the district court under 28 U. S. C. §§1331 and 1337. (*Capital Service Inc.* v. *Labor Board,* 347 U. S. 501; *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218; *Query* v. *United States,* 316 U. S. 486; *Public Utilities Commission* v. *Gas Co.,* 317 U. S. 456, 467.)

(10) Accordingly, we believe this Court should grant the three writs of mandamus here sought and on certiorari reverse the decision of the Court of Appeals in order that the federally created and sanctioned rights of the petitioner may be preserved and protected and not abandoned by the federal courts to immediate destruction.

ARGUMENT

POINT I

Since, with the express sanction of the U. S. Treasury Department, the petitioner was exercising rights and conducting a business legalized by federal statutes and rules regulative of commerce in furtherance of a national policy and in a field where the national power was exclusive and plenary, the petitioner had a federal right to protection of such sanctioned rights and business in the federal courts and could not lawfully be relegated to the uncertainties and restrictions of some futural suit in the courts of a state which had no sovereignty in the area wherein Congress had enacted and wherein state action was expressly prohibited by the Commerce, Import-Export and Supremacy Clauses.

A

We submit that Judge Bicks' opinion overlooked controlling distinctions and principles rendering inapplicable its reasoning and cases cited:

(1) The petitioner's rights and export business are the creatures of an Act of Congress in an area wherein the sovereignty of the Nation is supreme, exclusive and preemptive.

(2) The petitioner's complaint invokes the original jurisdiction expressly imposed on the district court for protecting the national implementations of such an Act of Congress from attempted frustration or veto by state legislation and organisms.

(3) The petitioner's complaint invokes the Supremacy Clause affirmatively for the protection of national action in the national field, and not merely negatively for the thwarting of state action in the field of private rights.

(4) The judicial precedents invariably affirm (as indeed they must) not only the right but the duty of the district court to proceed where the plaintiff's rights are grants under an Act of Congress in an area wherein the national sovereignty is supreme and preemptive and state intrusion is expressly excluded by the Commerce and Import-Export Clauses.

(5) Where rights so derived constitute the plaintiff's case, a district court negates the exclusive national sovereignty by sending the plaintiff into the courts of another sovereignty which has no jurisdiction at all in the area wherein Congress created such rights.

(6) In such a case violation of "comity" (if there be any) originates not with the district court in proceeding with its original jurisdiction but with the prior intrusion by the state agency into the preemptive national area.

(7) In none of the decisions cited by Judge Bicks were there present these controlling facts and principles. Wherever they were present, this Court and other federal courts have always upheld the duty of the district court to proceed as required by the governing statutes.

(8) Where, as here, New York attempts to declare illegal what the National Government, acting in its sphere, has legalized, a district court, while professing jurisdiction, effectually negates it by postponing its exercise. The result is the equivalent of a dismissal of the complaint. All relief, notwithstanding the imminent and irreparable damage, is refused.

B

(1) Essential to our constitutional structure is the principle thus enunciated in *Board of Trustees* v. *United States*, 289 U. S. 48, concerning the "exclusive and plenary" power of Congress over foreign commerce (pp. 56-7):

> "As an exclusive power, its exercise may not be limited, qualified or impeded to any extent by state action. [Citing cases] The power is buttressed by the express provision of the Constitution denying to the States authority to lay imposts or duties on imports or exports without the consent of the Congress. Art. I, §10, par. 2. • • •
>
> The principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce."

Of necessity the power to regulate foreign commerce and make reciprocal commercial agreements with foreign nations is and must be exclusively in the United States as the constitutional representative of all the States for such purposes.

This exclusive and preemptive power over foreign commerce is part of the larger constitutional principle which requires "the supremacy of the national power in the general field of foreign affairs". (*Hines* v. *Davidowitz*, 312 U. S. 52, 62-64.)

"Plainly, the external powers of the United States are to be exercised without regard to state laws or policies." (*United States* v. *Belmont*, 301 U. S. 324, 331.)

This federal primacy in the field of foreign commerce and over the export of alcoholic beverages has been expressly recognized and acceded to by the New York courts. (*Matter of Gulf Oil Corp.* v. *McGoldrick*, 256 App. Div. 207, 210, aff'd 281 N.Y. 647, aff'd *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414; *Rosenblum* v. *Frankel*, 279 App. Div. 66, 68; *Dur-*

ing v. *Valente*, 267 App. Div. 383, 385-6.) Also by the courts of other states. (*National Distillers Products Corp.* v. *City and County of San Francisco*, 141 Cal. App. 2d 651, 297 P. 2d 61, cert. den. 352 U. S. 928; *Parrott & Co.* v. *City and County of San Francisco*, 131 Cal. App. 2d 332, 280 P. 2d 881.)

(2) The Tariff Act of 1930 is expressly entitled "An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, to protect American labor, and for other purposes". 46 St. p. 590.

To achieve these statutory objectives, the U. S. Bureau of Customs has evolved a regulatory scheme and program, of which this petitioner is a part, to encourage the export of domestic wines and liquor, free of federal or state tax. This program also embodies our relations with foreign nations which extend a *pro tanto* tax immunity, reciprocal to that granted by the United States (7a, 8a, 39a).

Accordingly, Section 311 of the Tariff Act of 1930, 19 U. S. C. §1311 and the regulations thereunder clearly constitute a comprehensive and preemptive federal program in the national interest and with foreign nations, immune from let or hindrance by New York. "The right to engage in interstate commerce is not the gift of a state" and "a state cannot regulate it or restrain it." *Hood & Sons* v. *Du Mond*, 336 U. S. 525, 535, 537-538.

Hence here we have at stake a national concern "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject". *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230; *Pennsylvania* v. *Nelson*, 350 U. S. 497, 504; *Hines* v. *Davidowitz*, 312 U. S. 52, 62-69.

Moreover, "the scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it". *Pennsyl-*

vania v. *Nelson*, 350 U. S. at p. 502; *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230.

Customs regulations within the purview of the Congressional enactments as to foreign commerce are "necessary or appropriate" "means to the desired end." (*McGoldrick* v. *Gulf Oil*, 309 U. S. 414, 428.)

Accordingly, we submit, since the exported liquor here involved is in a federal enclave and under federal sovereignty for a federal purpose, the federal courts may not abandon their *statutory* jurisdiction and obligation in exaggerated deference to a supposed "comity" or some supposed state right to priority of procedure. *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, 386, 391-2; *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 536-538; *Maynard & Child, Inc.* v. *Shearer, Ky.*, 290 S. W. 2d 790, 794.

Remission to a sovereignty which has no jurisdiction over the rights and property presented for protection is a logical and legal absurdity.

Moreover, it invites state courts into matters of national policy which the Constitution and Congress have expressly committed to the judicial power of the United States, and thereby would entail all the hazards, multiplicities, confusions and delays inherent in dual jurisdiction. (*Pennsylvania* v. *Nelson*, 350 U. S. 497, 509.)

(3) "Where the issue is essentially federal, the federal court proceeds at once." (*All American Airways* v. *Village of Cedarhurst*, 201 F. 2d 273, 277.) "It is a function the federal courts must perform even though state action is involved." (*General Electric Company* v. *Callahan*, 294 F. 2d 60, 66.)

If the New York Alcoholic Beverage Control Law is inapplicable, the petitioner will be entitled to an injunction against its attempted enforcement here by a state officer or agency. If, on the other hand, the New York law is applicable in its terms, then "it would conflict with federal

law and the ban of the supremacy clause would come into play." *Penagaricano* v. *Allen Corporation*, 267 F. 2d 550, 558. For this reason, the federal court upheld the exercise of jurisdiction in that case, stating (pp. 557-558):

> "* * * a preliminary glance at the apparent clash between federal and local authority reveals that * * * the exercise of federal authority here involved is wholly within the confine of a valid federal enactment * * *. And, whatever the local courts may hold to be the meaning of the local Act, the plaintiffs will be entitled to relief from its application. That is to say, *the plaintiffs will be entitled to the relief they request whichever way the local Act is construed.*" (Emphasis added.)

But here "there can be no doubt" of the "direct clash" of the New York statute as construed by the New York Attorney General and as pressed and acted on by the New York Liquor Authority "with the federal regulations" and hence "no occasion for postponement here for possible state action." *All American Airways* v. *Village of Cedarhurst*, 201 F. 2d 273, 277; *Chicago* v. *Atchison Topeka & Santa Fe R. Co.*, 357 U. S. 77, 84, 89; *California Commission* v. *United States*, 355 U. S. 534, 538, 539; *General Electric Co.* v. *Callahan*, 294 F. 2d 60, 64-5, decided August 24, 1961.

As truly said by Mr. Justice Harlan in his concurring opinion in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 250, "conflict is the touchstone of preemption."

POINT II

Moreover, the doctrine of abstention is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it. Here the facts, so far from being those requisite to the exception, exclude it.

(1) The limited and exceptional applicability of the doctrine of abstention was thus formulated by this Court in *Alleghany County* v. *Mashuda Co.*, 360 U. S. 185, 188-189 (1959):

> "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest."

And later in its opinion this Court said (p. 196):

> "The undesirability of a refusal to exercise jurisdiction in the absence of exceptional circumstances which clearly justify an abstention is demonstrated by the facts of this case. * * * It exacts a severe penalty from citizens for their attempt to exercise rights of access to the federal courts granted them by Congress to deny them 'that promptness of decision which in all judicial actions is one of the elements of justice.' *Forsyth* v. *Hammond*, 166 U. S. 506, 513."

In *Propper* v. *Clark*, 337 U. S. 472 (1949) the Alien Property Custodian, a federal agent in a field wherein the

federal government was supreme by reason of its war power, sued for property claimed by a state court receiver who urged that the federal court should abstain pending state court decision as to the state statutes involved. Holding to the contrary, this Court said (p. 492):

> "The submission of special issues is a useful device in judicial administration in such circumstances as existed in the *Magnolia, Spector, Fieldcrest* and *Pullman* cases, *supra,* but in the absence of special circumstances, 320 U. S. 236, 237, it is not to be used to impede the normal course of action where federal courts have been granted jurisdiction of the controversy."

In *Meredith* v. *Winter Haven,* 320 U. S. 228 (1943), this Court said (p. 237):

> "No litigation is pending in the state courts in which the questions here presented could be decided. We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess."

(2) We know of no decision where, on facts even remotely resembling those here present, this Court has ever countenanced abstention or postponement.

If, on the present facts and notwithstanding the explicit grounds of original jurisdiction, the district court rightly turned this petitioner away and, without any protection at all, deferred it to some presently non-existent state court action, then "abstention" has assuredly become the rule, while the possibility of exception becomes too nebulous for meaningful formulation.

Here New York is attempting to veto what the United States has established; to tear down what the United States has built up.

If such a *res* is not the primary concern of the district court, we cannot conceive what more must be added to make it so.

There was no time for temporizing, experimenting or speculating. The State Liquor Authority, supported by the State Attorney General, had already proscribed; had cut all the petitioner's lifelines; and was moving toward civil and criminal prosecution and extinction.

POINT III

An unbroken line of decisions in this and other federal courts uphold the right of this petitioner, by reason of the foregoing facts and principles, to an immediate and full exercise of the original jurisdiction of the district court.

In *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, this Court held that the federal district court should grant relief without awaiting state court litigation under circumstances far less compelling than those present here. There officials of the State of Oklahoma seized a consignment of liquor consigned to the federal military reservation at Fort Sill, purporting to act under a State law forbidding the importation or transportation of intoxicating liquor in the State without a permit.

Since the federal power over military reservations was supreme and exclusive, this Court held the Oklahoma statute inapplicable in law, whether or not applicable by its terms, and stated (321 U. S. at p. 386):

> "To construe the state statute in the manner urged would be to say that, although Oklahoma admittedly

> has no power directly to regulate the liquor traffic on the Reservation, the Oklahoma legislature intended practically to exclude from the Reservation liquor which might be put to legal uses under controlling United States laws."

Immediate exercise of federal jurisdiction was likewise upheld because of federal preemption in *Chicago* v. *Atchison, Topeka & Santa Fe R. Co.*, 357 U. S. 77. There, this Court held that the City of Chicago had no power to place under license pursuant to its Code motor vehicle service between terminals of interstate railroads because such service was (p. 89) "an integral part of interstate railroad transportation authorized and subject to regulation under the Interstate Commerce Act."

There, as here, the argument was made that decision should be postponed pending a State court adjudication (p. 84). This Court replied (p. 84):

> "Under the circumstances we do not believe this procedure is warranted."

In *California Commission* v. *United States*, 355 U. S. 534, this Court affirmed an injunction issued by a three-judge court restraining the California Public Utilities Commission from enforcing a state statute which would subject to state regulation the rates charged by common carriers for transporting Government property. In rejecting the arguments that there was no "actual controversy" because the Commission had not as yet acted adversely, and that the Government should first pursue administrative remedies before the California Commission, this Court held (355 U. S. at p. 538):

> "The Commission has plainly indicated an intent to enforce the Act; and prohibition of the statute is so broad as to deny the United States the right to ship at reduced rates, unless the Commission first gives its approval."

And this Court went on to quote in a footnote (p. 544) the following by Chief Justice Marshall in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 427:

> "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence."

In *Florida Lime Growers* v. *Jacobsen, Director*, 362 U. S. 73, the appellants were engaged in the business of growing, packing and marketing Florida avocados in interstate commerce pursuant to the Federal Agricultural Marketing Agreement Act of 1937 and Florida Avocado Order No. 69 issued thereunder. They claimed that the California Department of Agriculture was, inconsistently with this federal regulation of interstate commerce, declaring illegal the sale of their avocados in California for noncompliance with the requirements of the California Agricultural Code. A three-judge district court in California had dismissed the complaint on the ground that the plaintiffs' "claim at best suggested no more than a threatened controversy" (169 F. Supp. 774, 776)—just as Judge Bicks here held that the instant case was in a "tentative and hypothetical posture" (53a).

This Court reversed on the ground that the California authorities, by consistently taking the position that the shipments were illegal, had created "an existing dispute between the parties as to present legal rights amounting to a justiciable controversy" (p. 85) which threatened the plaintiffs with irreparable damage and loss of the product, and that, since the plaintiffs' rights were grounded in an Act of Congress regulating interstate commerce, they were entitled to a decision on the merits by a three-judge district court.

Query v. *United States*, 316 U. S. 486, upheld the same principle. The pertinency of the decision is shown in its first headnote:

> "A suit to restrain the enforcement of a state tax on the purchase and sale of goods at Army Post Exchanges, upon the ground that such Exchanges are federal instrumentalities and that therefore the state statute imposing the tax is, as applied to them, unconstitutional, is a suit cognizable by a three-judge District Court, under Jud. Code §266."

In *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, the Yosemite Park & Curry Co. sued to enjoin the California Attorney General and the Board of Equalization from enforcing within the limits of the Yosemite National Park California's Alcoholic Beverage Control Act. As the ground of jurisdiction, the plaintiff alleged that it was operating within the Park hotels, camps and stores under a contract and lease from the United States Secretary of the Interior. On the plaintiff's appeal from an adverse decision by a three-judge district court, this Court held that, since the plaintiff's rights were grounded in legislation by the United States as the owner of the Park, a decision on the merits of the controversy was the proper function of a three-judge district court, and it remanded for such a determination "in accordance with this opinion of the applicability of such sections of the (California) Act as the State may threaten to enforce" (p. 539). Remission to the California Board of Equalization for consideration of the interpretation and application of the California Alcoholic Beverage Control Act was not envisaged.

Indeed, under the circumstances here present, a district court of three judges would have had the power and would have been bound to enjoin a state enforcement suit against the petitioner if such a suit had then been pending. To quote *Capital Service, Inc.* v. *Labor Board*, 347 U. S. 501, 504:

> "But where Congress, acting within its constitutional authority, has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right. See *Public Utilities Commission* v. *Gas Co.*, 317 U. S. 456, 468-470; *Bowles* v. *Willingham*, 321 U. S. 503, 510-511."

In *Hines* v. *Davidowitz*, 312 U. S. 52, where this Court affirmed an injunction by a three-judge district court enjoining officials of the Commonwealth of Pennsylvania from enforcing against an alien provisions of the Pennsylvania Alien Registration Act on the ground that it conflicted with the Federal Alien Registration Act, this Court on page 62 appended the following footnote:

> "The importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field are clearly developed in Federalist papers No. 3, 4, 5, 42 and 80."

In *General Electric Co.* v. *Callahan*, 294 F. 2d 60, the Court of Appeals for the First Circuit in a decision rendered last August said (pp. 65-6):

> "The question is whether federal legislation has 'pre-empted the field' which the State Board acting under the Massachusetts statute proposes to enter. The answer depends upon the construction of federal legislation and this, of course, is a function of the federal courts. And it is a function the federal courts must perform even though state action is involved."

POINT IV

The decisions cited by Judge Bicks (52a-55a) are, we submit, wholly inapposite in their facts and rationales.

(1) The last cited is *Martin* v. *Creasy*, 360 U. S. 219. There the plaintiffs had no such federal status as this petitioner and their rights and property no preemptive federal origin. The plaintiffs were merely private land owners. Their sole claim was that the Governor of Pennsylvania was about to designate their lands as "a limited access highway", and that subsequent proceedings under the state condemnation statute might not provide adequate compensation. This Court held that Pennsylvania's officers and agencies had not as yet challenged the plaintiffs' constitutional rights to full compensation. Moreover, the plaintiffs had pending a state court suit in which the Supreme Court of Pennsylvania had already interpreted the condemnation statute as providing (to quote this Court) "a complete procedure to guard and protect the plaintiffs' constitutional rights 'at all times' " (p. 223).

Decided on the same day as *Martin* v. *Creasy*, was *Harrison* v. *N.A.A.C.P.*, 360 U. S. 167, a case also cited by Judge Bicks (53a). Its inappositeness appears, we submit, on its face.

There the plaintiffs were merely private New York membership corporations which wished to contribute assistance to colored persons engaged in litigations involving their constitutional rights. The plaintiffs feared that certain Virginia statutes might make such assistance criminal. The Virginia authorities, instead of taking steps against the plaintiffs, or threatening to do so, assured the plaintiffs and the federal courts that they were "withholding action under the authority of the (state) statutes until a final decision is reached" in the state courts as to their meaning

and application. This Court stated that there was no reason to assume that "such assurances will not be honored"; but that, if they were not, the district court could extend protection while the state "case goes forward" (p. 179).

In the present case not only were there no such "assurances", but the contrary. No state suit was pending. The district court refused protection in the meanwhile.

In *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, cited by Judge Bicks as the "beginning" case (52a), certain Texas railroads sued to enjoin an order of the Texas Railroad Commission requiring that no sleeping cars should be operated unless there was in charge a conductor as well as a porter. The primary issue was whether the Commission had statutory authority to make the order. This Court stated (p. 498) that, since pullman porters were colored and conductors white, the Commission's order "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open"; and that (p. 501) resort to the adequate means "with full protection" furnished by the state court procedures was such an alternative. Furthermore, the plaintiffs, unlike the petitioner here, were not sanctioned instrumentalities of a preemptive federal statutory plan; and their business was not confronted with destruction, immediate or otherwise.

The other decisions of this Court cited by Judge Bicks (52a-55a), such as *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 100, and *Burford* v. *Sun Oil Co.*, 319 U. S. 315, are in the same pattern of fact and legal principle as the above, and, for like reasons, have no application here.

(2) Judge Bicks' description of the controversy as having merely a "tentative and hypothetical posture" (53a) was inconsistent with his own finding that at the very time the case was before him the actions of the State Attorney General and Liquor Authority had cut the petitioner's supply lines and faced it with "the prospect of closing its doors" (51a).

The complaint and the affidavits before Judges Bicks and Dimock clearly stated a present justiciable controversy causing present irreparable damage (*Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73, 85; *California Commission* v. *United States*, 355 U. S. 534, 536-9; *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77, 83-4).

POINT V

Furthermore, in abstaining the exercise of an acknowledged jurisdiction, pending some future state court action, Judge Bicks erred in his own reasoning by overlooking that the New York appellate courts had repeatedly held the New York Beverage Control Law inapplicable or "inoperative" as against the very thing here involved, namely, the export of liquor under Section 311 of the Tariff Act of 1930 and the Internal Revenue Code.

Judge Bicks was mistaken in his basic statement that "the issues have never been presented to or passed upon by the state courts" (54a). The opposite is the fact.

In *Matter of Gulf Oil Corp.* v. *McGoldrick*, 256 App. Div. 207 (1st Dept., 1939), aff'd 281 N. Y. 647, aff'd *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414, the Appellate Division upheld a protest against the imposition of a New York City sales tax on oil manufactured in bond and stored in Class 6 Warehouses under U. S. Customs regulations and supervision pursuant to §311 of the Tariff Act of 1930, 19 U. S. C. §1311. After emphasizing "the careful control exercised by government officials over goods that have been taken into Class 6 Warehouses" and the fact that such goods are "constantly under government supervision" (256 App. Div. at p. 209), the Court continued (p. 210):

> "The power of Congress to regulate commerce with foreign nations 'is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified or impeded to any extent by State action. * * * The power is buttressed by the express provision of the Constitution denying to the States authority to lay imposts or duties on imports or exports without the consent of the Congress. Art. I, §10, par. 2.' (*Board of Trustees* v. *United States*, 289 U. S. 48.")

And the Appellate Division further said (p. 212):

> "The regulation of the product being so complete and the purpose thereof so manifest as a proper exercise of the power of Congress under the Commerce Clause it must be held that the tax is a burden on foreign commerce and repugnant to the expressed intention of Congress."

Both the New York Court of Appeals and this Court affirmed. The Court of Appeals adopted what was said by the Appellate Division (281 N. Y. 647). This Court said that the purpose of this federal legislation was to (309 U. S. at p. 427):

> "* * * enable the American manufacturers to compete more favorably with their foreign competitors * * *."

Accordingly, this Court concluded (309 U. S. at p. 429):

> "The state tax in the circumstances must fail as an infringement of the Congressional regulation of the commerce."

If there is no state or local power to tax exports under Section 311 of the Tariff Act of 1930, *a fortiori* there is no power to proscribe them.

In *During* v. *Valente*, 267 App. Div. 383 (1st Dept., 1944) the New York Appellate Division held that the pro-

visions of the Alcoholic Beverage Control Law were not applicable or were "inoperative" if applied to sales of liquor in foreign commerce in the Free Trade Zone of the Port of New York.

In so holding, the Appellate Division stated (267 App. Div., at pp. 385, 386):

> "It is obvious that this zone is created under the power of Congress to regulate commerce with foreign nations. This power is exclusive and plenary. • • •
>
> "The fact that this trade zone is within the geographical limits of the State of New York is not controlling. • • •
>
> "The allegations herein are consistent with the sale of the brandy in foreign commerce or the mere transfer of title to goods remaining in the trade zone. In such a transaction the State statute requiring licenses and permits is inoperative as imposing an added burden upon foreign commerce which Congress has the exclusive power to regulate. (*Matter of Gulf Oil Corp.* v. *McGoldrick, supra.*)"

In *Rosenblum* v. *Frankel*, 279 App. Div. 66 (1st Dept., 1951) the same Court reaffirmed *During* v. *Valente, supra*, and held (p. 68):

> "Neither do the regulatory powers of the State Liquor Authority extend to international transactions, even in alcoholic beverages, except sales for domestic consumption in New York State."

Hence there was no occasion or justification here for postponing the full exercise of the district court's original jurisdiction or for remitting the petitioner to the state courts.

In *Hillsborough* v. *Cromwell*, 326 U. S. 620, 629, the Supreme Court held that there was no occasion for "re-

mitting the claimant to the state courts for determination of the local law question" where, as here, the State courts have given "an authoritative interpretation of the local law."

POINT VI

Furthermore, even if, *arguendo*, the state remedies afforded by Alcoholic Beverage Control Law §121 were deemed available to the petitioner, they are by their very terms inadequate for the petitioner's protection and have been so held judicially.

By its subpoena *duces tecum* issued to the plaintiff, the State Liquor Authority sought to cut in ahead of the petitioner's appeal and to hale the plaintiff before itself as the tribunal to pass upon its own challenge to the plaintiff's federal rights (75a-76a, 84a-85a).

Alcoholic Beverage Control Law §121, on which the defendants relied before Judge Bicks (66a-67a), provides the sole method for judicial review of determinations of the State Liquor Authority. But Section 121 provides that no stay may be granted by the New York courts in such a proceeding except "for a period not exceeding thirty days". *Matter of Yacht Club Catering* v. *Bruckman*, 276 N. Y. 44 holds that this period is mandatory, regardless of "irreparable damage to the individual" (276 N. Y. at p. 48). In accord: *Barcus* v. *O'Connell*, 281 App. Div. 1064 (3rd Dept., 1953).

For this reason, the State "remedy" afforded by Section 121 is utterly inadequate, and the Court so held in *Burack* v. *State Liquor Authority of State of New York*, 160 F. Supp. 161 (D. C., N. Y., 1958). Judge Rayfiel there issued a temporary injunction restraining the State Liquor Authority from using wire-tap evidence in a proceeding to revoke or suspend a license. After referring

to the holding in *Benanti* v. *United States,* 355 U. S. 96, 104, that the Federal Communications Act and §605 thereof in particular "is a comprehensive scheme for the regulation of interstate communication", Judge Rayfiel held that the federal statute was preemptive, and concluded, in language which could have been written for this case, that §121 of the Alcoholic Beverage Control Law did *not* provide an adequate state remedy and that a temporary injunction should be granted. Judge Rayfiel said (160 F. Supp. at p. 165):

> "A further reason for my conclusion is the provision in §121, supra, that no stay shall be granted pending the determination of the matter for a period of more than thirty days. That period may not be extended. *Barcus* v. *O'Connell,* 281 App. Div. 1064, 121 N. Y. S. 2d 366. Because of that 30-day provision *the time still available for the filing and final determination of state court proceedings is inadequate. Even if the plaintiff should be successful in such a proceeding he would win but a Pyrrhic victory.*"

So here. If the petitioner had followed Judge Bicks' remission and sought in the state courts a judicial review, it "would win but a Pyrric victory," indeed not even that because its business and its lease would have been long dead before a final determination.

In *Pacific Tel. Co.* v. *Kuykendall,* 265 U. S. 196, the Supreme Court noted that the State law permitted a stay against a decision of a State administrative tribunal for only a limited period (there, one year). The Supreme Court reversed the decision of the district court refusing jurisdiction and held (pp. 204-205):

> Under such circumstances *comity yields to constitutional right,* and the fact that the procedure on appeal in the legislative fixing of rates has not been concluded will not prevent a federal court of equity

from suspending the daily confiscation, if it finds the case to justify it."

Even under the statutes forbidding the district courts to exercise jurisdiction over a challenge to State taxes or rate orders, the Supreme Court has uniformly held that the district court should exercise jurisdiction unless it affirmatively appears that "a plain, speedy and efficient remedy may be had in the courts of such State." 28 U. S. C. §§1341, 1342.

Corporation Comm. v. *Cary*, 296 U. S. 452, 458;
Mountain States Co. v. *Comm.*, 299 U. S. 167, 170;
Driscoll v. *Edison Co.*, 307 U. S. 104, 110;
Hillsborough v. *Cromwell, supra*, 326 U. S. 620, 628.

POINT VII

Even assuming *arguendo* that Judges Bicks, Dimock and Cashin lawfully decreed abstention, nevertheless they should not have left the petitioner naked to the current lethal assaults upon it by the State Liquor Authority, but should have made their own reservation of jurisdiction meaningful by enjoining those assaults pending reasonably expeditious outcome in some future suit in the state courts. The refusal of Judges Bicks and Dimock to do so was appealable to the Court of Appeals.

1. Judge Bicks recognized that petitioner "faces the prospect of closing its doors" (51a). More importantly perhaps, a door fashioned by the Nation for its foreign commerce and fulfillment of its commercial agreements with other nations likewise faced closing!

By retaining jurisdiction, the single-judge district court likewise retained its concomitants. Hence, in order to make and keep its retention meaningful by keeping the *res*

undestroyed by the current mortal assaults, the district court should at the very least have temporarily enjoined such assaults pending ascertainment of the adequacy of protection procurable in some futural suit in the state court. Otherwise, in the interval the plaintiff's rights could well become moot for lack of a *res*.

In *Harrison* v. *N. A. A. C. P.*, 360 U. S. 167, one of the two most recent cases cited by Judge Bicks (53a), this Court rested heavily on the fact that the state agency gave acceptable "assurances" that no hostile action would be taken pending final decision by the state courts (p. 179).

Here, not only was no such assurance given, but the Liquor Authority and the State Attorney General continually intensified its war against the petitioner. (*Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73, 85; *California Commission* v. *United States*, 355 U. S. 534, 538.)

2. Abstention by Judges Bicks and Dimock from granting a temporary injunction was equivalent to a refusal appealable to the Court of Appeals. 28 U. S. C. §§1291 and 1292(a)(1). The dismissal of the appeal by the Court of Appeals for lack of jurisdiction was like error.

POINT VIII

Even if, notwithstanding the allegations of the complaint and affidavits, the doctrine of abstention could be considered, consideration of it was exclusively for the requested three-judge district court pursuant to 28 U. S. C. §§2281, 2284.

(1) The duty of a single-judge district court to determine initially whether there is present "a substantial federal question" to confer jurisdiction is altogether different from his duty, after determining that jurisdiction does exist, to proceed with it as required by 28 U. S. C. §§2281, 2284.

The former duty is a statutory duty at the threshold. The latter is a juridical duty after the threshold has been passed. Hence, in no sense is the latter an incident to or a corollary of the former.

To contend the contrary is to confuse two subjects entirely distinct in fact, in law and in their timing,—to confuse the initial query as to the existence of jurisdiction with the subsequent uses of an existing jurisdiction.

Judge Bicks affirmed jurisdiction by the very act of retaining it, but he denied the application for a temporary injunction by the very act of abstaining from granting it.

(2) If analogy be sought, "abstention", as ordered by Judge Bicks, had apt analogy, if not identity, with denial of temporary injunction,—a subject exclusively for the three-judge court [28 U. S. C. §2284(5)].

As the Court of Appeals truly said here (106a):

> "Appellant was effectively out of court,—any action upon its prayer for injunctive relief was indefinitely postponed under these circumstances."

Hence, we believe sound and inescapable, both in general principle and especially in the circumstances of this case, the holding of the Court of Appeals that (108a):

> "the determination of whether a federal court ought to abstain is a determination that may only be made in the first instance by a three-judge district court."

In short, we submit that the statute, the nature of the issue itself, and the nature, effect and consequence of the determination to abstain required consideration by a three-judge district court.

The statute for a three-judge court is "highly remedial legislation" and should not be "evaded and circumvented" by judge-made exceptions. (*Board of Supervisors* v. *Tureaud*, 207 F. 2d 807, 808-9, vacated and remanded on other grounds, 347 U. S. 971.)

POINT IX

In any event the Court of Appeals erred, we submit, in not vacating the orders of Judge Bicks and Judge Dimock which it held to have been made without jurisdiction, and in not remitting the case for "such further proceedings to be had as may be just under the circumstances." 28 U. S. C. §2106.

(1) The failure of the Court of Appeals to vacate those orders in order to formalize its decision that they were made without jurisdiction and hence nullities, left the door open for Judge Cashin's subsequent interpretation (which we are contesting as yet another anomaly) that such orders are "still in full force and effect" and "still the law of the case" (133a).

All three judges in the Court of Appeals have agreed that "the orders made by Judges Bicks and Dimock are of the sort which are ordinarily appealable" to that Court under 28 U. S. C. §§1291 and 1292(a)(1) (105a-106a, 109a, 111a).

The majority, however, reached the frankly "*anomalous* position" (108a) of distinguishing its own recent decision in *Bell* v. *Waterfront Commission of New York Harbor*, 279 F. 2d 853 (107a, 109a), and of dismissing Idlewild's appeals, on the very grounds that Idlewild was right in its contentions that "a substantial federal question existed" on constitutional grounds and that "a three-judge district court should have been convened" (109a).

Assuming, *arguendo*, that the Court of Appeals could not lawfully have followed through by directing the district court to convene a three-judge court, nevertheless that Court had power to effectuate the very ground of its own decision by formally vacating as nullities the orders of the district court and by remanding the case for further consideration,—precisely as empowered by 28 U. S. C. §2106.

This course has been repeatedly taken by other appellate courts (including this Court) in identical circumstances.

In *Phillips* v. *United States*, 312 U. S. 246, this Court held that the suit had been mistakenly brought under Section 266 of the then Judicial Code and that, in consequence, a three-judge court had been mistakenly convened and had mistakenly acted under that section. An appeal having been taken to this Court from the three-judge decision, this Court held itself without authority to entertain the appeal (p. 248), but that (p. 254):

> "While this Court cannot hear the merits, it will, where the question of jurisdiction was not obviously settled by prior decisions, enforce the limitations of §266 by an order framed to save appellants their proper remedies. *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386, 392. We therefore vacate the decree and remand the cause to the court which heard the case so that it may enter a fresh decree from which appellants may, if they wish, perfect a timely appeal to the circuit court of appeals."

In *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386, this Court held, under like circumstances, that it was without jurisdiction to entertain the appeal, but nevertheless directed, in order to "save to the appellants their proper remedies", that (p. 392):

> "But in the circumstances, it is appropriate that the decree below should be vacated and the cause remanded to the district court for further proceedings

to be taken independently of §266 of the Judicial Code. *Gully* v. *Interstate Natural Gas Co., supra.*"

The identical course on substantially identical facts was also taken by this Court in *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16, 19.

In *Board of Supervisors* v. *Tureaud*, 207 F. 2d 807, vacated and remanded on other grounds 347 U. S. 971, a single-judge district court had refused to convene a three-judge court and had proceeded with hearing the case itself. Appeal was taken to the Court of Appeals for the Fifth Circuit which held (p. 810):

> "We are in no doubt that the suit from which this appeal comes was one for three judges, that the district judge was without jurisdiction to hear and determine the application for injunction, and that the order should be vacated and the cause remanded to the district judge with directions to take further proceedings not inconsistent herewith."

In *Two Guys From Harrison-Allentown* v. *McGinley*, 266 F. 2d 427, the Court of Appeals for the Third Circuit held under like circumstances that (p. 433):

> "We have the power to vacate the order of the court below improvidently entered but we can go no further. Cf. Section 2106, 28 U. S. C. We do not, however, possess the power to adjudicate the merits of the appeal. Consequently, we will vacate the judgment of the court below and will remand the cause for appropriate action."

(2) The failure of the Court of Appeals to vacate orders which it declared to be erroneous and without jurisdiction, had the effect of creating a decision which it itself described as "anomalous" and productive of "unhappy results," and also of creating the further anomaly of

Judge Cashin's decision that those very orders "are still the law of this case" (133a),—a conclusion directly contradicted by the inherent inconsistency and by *Dictagraph Products Co.* v. *Sonotone Corp.*, 230 F. 2nd 131, dism. per stip. 352 U. S. 883.

POINT X

Assuming for argument's sake that the petitioner was not entitled to the convening of a three-judge court, nevertheless it was entitled for its adequate protection to the exercise of the original jurisdiction of the district court under 28 U. S. C., Sections 1331 and 1337.

The refusals of the single-judge district court to proceed with the exercise of that jurisdiction and to grant the petitioner protection by temporary injunction were errors appealable to the Court of Appeals; and the action of the Court of Appeals in dismissing the appeals for lack of jurisdiction was further error.

If it be assumed for the sake of argument that the petitioner did not state a case falling within the purview of Sections 2281-4, U. S. C., nevertheless the complaint and moving affidavits stated a clear case for the protection of this petitioner under Sections 1331 and 1337, 28 U. S. C., imposing upon the district court original jurisdiction over actions arising as does this action.

In a district court a plaintiff is entitled to whatever relief the statement of claim shows him to be entitled. F. R. C. P., Rule 8(e)(2) and (f), Rule 54(c) and Rule 57.

Sections 2281-4 do not draw to themselves every case where federal injunction is sought against state officials or bodies claiming to act under authority of the state. Where, in a field *pre-empted* by Act of Congress regulating commerce, the plaintiff is acting under authorization of the Act

and in implementation thereof, the fact that the suit seeks a federal declaratory judgment that a state or a state official or agency claiming to act under state authority has no jurisdiction in such pre-empted area does not relieve a single-judge district court from accepting and exercising full jurisdiction under Sections 1331 and 1337, U. S. C.

Any failure or refusal to accept such jurisdiction and to proceed with it on the merits is appealable to the U. S. Court of Appeals. If the latter court also similarly fails or refuses, this second error can be corrected here.

In the present case, Section 311 of the Tariff Act of 1930 and Sections 5521-3 of the Internal Revenue Code have entrusted the Treasury Department and its Bureau of Customs to be the federal agency to administer the provisions and policies thereof in the field of foreign commerce; and the Treasury Department, Bureau of Customs, has expressly authorized the petitioner to conduct under its supervision this very business as "an exportation of merchandise within the meaning of section 311 of the Tariff Act" (16a).

In *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, a federal district court had dismissed suits brought by a warehouseman licensed under the United States Warehouse Act to enjoin further proceedings on a complaint filed by one of his customers with the Illinois Commerce Commission and to enjoin the Attorney General of Illinois from instituting proceedings against the warehouseman to enforce any order of the Commission in the matter. The Circuit Court of Appeals reversed on the ground that the United States Warehouse Act superseded state regulation of warehousemen licensed thereunder as to the matters presented in the complaint; and this Court affirmed. Its holdings on this subject are correctly summarized in headnotes 2 and 4:

> "2. Warehouses licensed under the United States Warehouse Act need not obtain state licenses or comply with state laws regulating those phases of the busi-

ness which are regulated under the Federal Act, except those phases of the business which the Federal Act expressly subjects to state law."

"4. The test of applicability of state laws is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State."

In *Capital Service, Inc.* v. *Labor Board*, 347 U. S. 501, this Court upheld the jurisdiction of a single-judge district court under 28 U. S. C. §1337 to issue an injunction against a state Labor Board whose action conflicted with the exclusive jurisdiction of the National Labor Relations Board. This Court said (p. 504):

"But where Congress, acting within its constitutional authority, has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right. See *Public Utilities Commission* v. *Gas Co.*, 317 U. S. 456, 468-470; *Bowles* v. *Willingham*, 321 U. S. 503, 510-511."

To the same effect are, among many like decisions by this Court, *Query* v. *United States*, 316 U. S. 486; *Public Utilities Commission* v. *Gas Co.*, 317 U. S. 456, 467.

Conclusion

We submit that this Court (1) should grant the three writs of mandamus here sought against Judges Bicks, Dimock and Cashin to correct their respective refusals to exercise the jurisdiction to which the petitioner was entitled; and (2) should on certiorari reverse the decision of the Court of Appeals in holding itself without jurisdiction to do aught but dismiss the petitioner's appeals without more; and (3) grant such other relief as may be in the interests of justice, together with costs as against the State Liquor Authority.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1961

No. 138

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, Being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,
Respondents.

Misc. 180

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

HONORABLE ALEXANDER BICKS, HONORABLE EDWARD J. DIMOCK, HONORABLE JOHN M. CASHIN, Judges of the United States District Court for the Southern District of New York,
Respondents.

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MISCELLANEOUS:

1960 Opin. (N. Y.) Atty. Gen. 8 17

IN THE

Supreme Court of the United States

October Term, 1961

No. 138

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, Being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,
Respondents.

Misc. 180

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

HONORABLE ALEXANDER BICKS, HONORABLE EDWARD J. DIMOCK, HONORABLE JOHN M. CASHIN, Judges of the United States District Court for the Southern District of New York,
Respondents.

RESPONDENTS' BRIEF

Opinions Below

The first opinion of the District Court (BICKS, J.), dated November 4, 1960, is reported at 188 F. Supp. 434 (49a-55a).[1]

The second opinion of the District Court (DIMOCK, J.), dated December 28, 1960, has not been officially reported (88a-92a).

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[1] All references are to the Record herein.

The majority and dissenting opinions of the Court of Appeals, dismissing petitioner's appeals from the orders entered upon the foregoing decisions, are reported at 289 F. 2d 426 (103a-115a).

The subsequent decision of the District Court (CASHIN, J.), dated May 3, 1961, is reported at 194 F. Supp. 3 (130a-135a).

The District Court (BICKS, J.) ruled that "The threshold issue is whether the federal courts should accept jurisdiction now since the issues have never been presented to or passed upon by the state courts" (52a). The judge held that he had "the power to retain jurisdiction pending state court adjudication where, as here, there is insufficient basis to support intervention by a federal court of equity" (55a). Accordingly, Judge BICKS ordered abstention, denied the petitioner's application for the convening of a statutory three-judge Court, and retained jurisdiction with leave to renew the application after the State Court has ruled (55a).

The Court of Appeals held that determination of the question of abstention was a prerogative of the statutory Court and that it was incumbent upon the District Court, in the circumstances of this case, to convene the statutory Court. Concluding that the District Court was without jurisdiction to make the order, which it construed as, in effect, a dismissal of the complaint, it held that, constrained by this Court's decision in *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10 (1930), the petitioner had to be relegated to a motion in this Court for leave to file a petition to mandamus the District Court Judge to convene a statutory Court. Accordingly, it dismissed the appeal (105a-109a).

Jurisdiction

The grounds on which the jurisdiction of the Court is invoked are set forth in Petitioner's Brief (p. 2).

On October 9, 1961 this Court granted the petition for a writ of certiorari and for leave to file a petition for a writ of mandamus.

Questions Presented

1. Are the operations of the petitioner subject to the paramount control of the State by virtue of the Twenty-first Amendment to the Federal Constitution?[2]

2. Did the single-judge District Court have jurisdiction to order abstention and retain jurisdiction, pending State Court adjudication, as part of its function in passing upon the substantiality of the Federal question which it was required to find before it could order the convening of a statutory Court?

3. Did the District Court properly exercise its discretion in ordering abstention in the circumstances of this case?

Constitutional Provisions and Statutes Involved

Involved in this case are:

United States Constitution, Amendment XXI, § 2;[3]
27 U. S. C. § 121;[4]
28 U. S. C. §§ 1254(1), 1651(a), 2281 and 2284;[5]
New York Laws of 1935, ch. 246.[6]

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[2] The substantive question of State law (*i.e.*, an essential part of the merits of the controversy) is not before this Court.

[3] Set forth at page 18, *infra*.

[4] Set forth at page 18, *infra*.

[5] The pertinent provisions of these sections are set forth in the Appendix to this brief, pp. 41-42, *infra*.

[6] Set forth in Appendix to this brief, p. 43, *infra*.

Statement

An essential and integral part of the merits of the instant controversy is not now before this Court. In other words, the question of whether or not the transactions engaged in by the petitioner come within the ambit of proscribed acts under New York's Alcoholic Beverage Control Law §§3(28), 100(1) and 105(2), is purely a matter of State law and is not presented for the consideration of this Court.

Of relevance to the questions presented is the fact that by the complaint herein the petitioner seeks a declaratory judgment determining that the State statutes above mentioned, as sought to be applied to the petitioner, are violative of the Federal Constitution and certain Federal statutes and regulations which are asserted to be exclusive and preemptive in character. The petitioner also seeks a preliminary and permanent injunction of enforcement of the State statutes by the respondents, Rohan, *et al.*, against the petitioner (13a-14a).

The petitioner applied for the convening of a statutory three-judge District Court (32a-34a) and the respondents (Rohan, *et al.*, as the State Liquor Authority) cross-moved for a dismissal of the complaint (42a-43a).

On November 4, 1960 the District Court (Bicks, J.) denied the petitioner's motion for a statutory Court and held that the threshold issue was whether the Federal Court could accept jurisdiction at this time since the issues have never been presented to or passed upon by the State Courts.[1] The Court concluded that, although substantive

[1] The petitioner does not predicate the jurisdiction of the Federal Court on diversity of citizenship or any other basis, but rests solely on the alleged violation by the State statutes, as sought to be applied, of the Federal Constitution and of allegedly exclusive and preemptive Federal legislation and regulations (8a-12a).

issues raised in the complaint may not be considered by the Judge to whom an application is made, it has the power to order abstention and to retain jurisdiction pending State Court adjudication where, as here, there is insufficient basis to support intervention by a Federal Court of equity (50a-55a). The Court did not pass upon the respondents' motion to dismiss the complaint.

Upon appeal to the Court of Appeals (56a), the latter Court dismissed the appeal. The majority opinion of the Court of Appeals was to the effect that, since the complaint challenged the validity, under the Federal Constitution, of a State statute by reason of its claimed application to the petitioner, it was clear that a statutory Court should have been convened, this being the tribunal which deals with constitutional challenges of State activity. However, the Court held that if the District Court fails to convene the statutory Court and dismisses the complaint, the remedy is by writ of mandamus from the Supreme Court.

The Court of Appeals held that although, before convening a statutory Court, the District Court does have jurisdiction to determine the existence of a substantial Federal question, and although this question is properly reviewable by the Court of Appeals, the question of abstention, pending prior determination by the State Courts of the State issue, is only within the jurisdiction of a statutory Court and, thus, is not reviewable by the Court of Appeals.

Having held that Judge Bicks had no jurisdiction to make the determination which he made, the Court of Appeals decided that it, too, had no jurisdiction to entertain

the appeal. Since, as it held, a statutory Court should have been convened, the Court of Appeals dismissed the appeal.[8]

Summary of Argument

I

As to petition for writ of mandamus to compel convening of three-judge Court.

Since the petitioner has predicated the jurisdiction of the Federal Court on the sole ground that the State statute, as sought to be applied to it by the threatened action of the State officers, is violative of the commerce clause, the export-import clause, and the supremacy clause of the Federal Constitution, it is incumbent upon the single-judge District Court and it is within that Court's jurisdiction to determine the substantiality of the Federal question which is presented. Indeed, until the question of substantiality is determined favorably to the plaintiff (petitioner) there is no proper basis for the convening of a statutory three-judge District Court.

If, however, the Federal question is inextricably intertwined with a question of uncertain State law, without the resolution of which by the State Courts it cannot be determined whether there is, in fact, a Federal question before the Court or the posture in which the Federal question is presented, it is obvious that the Court cannot pass upon the substantiality of the Federal question. In such case, in order that a complete case may be submitted it is within

[8] The statement above should be sufficient as the basis for a complete consideration of the questions presented. The decisions of DIMOCK and CASHIN, JJ., are merely cumulative. Further facts relating to the petitioner's operation will be set forth in the ensuing argument.

the proper jurisdiction of the single-judge District Court to order abstention pending the resolution of the State question by the State Courts.

The substantiality of the Federal question presented in the case at bar depends upon the resolution of the question of State law as to whether the transactions in which the petitioner was involved, as vendor, constitute "sales" within the meaning of the State statutes.

The petitioner contends that the State statutory regulations are subject to the paramount regulation of the Federal Government under various constitutional provisions and under various Federal statutes and regulations in implementation of the constitutional provisions. The petitioner has misconceived this question as one of State law, although obviously it is a Federal question which has clearly been settled by the Federal Courts. This Court has held that, by virtue of the Twenty-first Amendment to the Federal Constitution, the regulatory rights of the State respecting intoxicating liquors are paramount to the regulatory rights of the Federal Government.

Under these circumstances, there being an adequate remedy in the State Courts, the District Court properly exercised its discretion in ordering abstention. Orderly procedure dictates that further progress in the determination of the substantiality of the Federal question await the final adjudication of the question of State law by the State Courts. Until the single-judge District Court is advised of such final adjudication by the State Courts it is not in a position to pass upon the substantiality of the Federal question and, therefore, is not in a position nor does it have jurisdiction to convene a statutory three-judge District Court. It follows inexorably that the petition for a writ

of mandamus from this Court to compel the convening of the statutory Court is premature and should, therefore, be dismissed.

II

As to Certiorari

If, as shown above, the single-judge District Court had jurisdiction, the Court of Appeals also had jurisdiction. Instead of dismissing the appeal it should have affirmed the decision of the District Court. However, there is no valid reason for disturbing the decision of the Court of Appeals because the ultimate result is the same in either event.

If, however, this Court agrees with the Court of Appeals that the District Court was without jurisdiction and that, consequently, it, too, was without jurisdiction, then this Court must agree that, based upon its own prior decision in *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10 (1930), certiorari does not lie. In *Stratton*, under identical circumstances, this Court directed the Court of Appeals to do exactly what it has done in this case.

By reason of the foregoing the petition for certiorari should be dismissed as having been improvidently granted.

III

Alternative Solution

Since the parties and the lower Courts have bogged down in a morass of procedural and jurisdictional complexities which are alleged to have created anomalous results, it is in order for this Court, as a practical solution, to dispose of this matter in a manner that is eminently fair

to both parties. It is suggested that this Court enter an order as follows:

(a) Grant the petition for mandamus;

(b) Remand the case to the single-judge District Court with instructions to cause the convening of a statutory three-judge District Court;

(c) Direct the statutory three-judge District Court to retain jurisdiction, but stay further proceedings pending the disposition of the related queston of State law by the State Courts.

ARGUMENT

POINT I

The petition for a writ of mandamus to compel the convening of a three-judge Court is premature because the single-judge Court is not in a position to determine the existence of a substantial Federal question.

The point here made, to put it in a nutshell, is that even though a potential Federal question lurks in the background, if the situation involved, legal or factual, has not ripened to the point where only a Federal question remains undetermined, there is not presented to the Federal Court the "complete product"[9] which is required as the basis for present determination of an unavoidable Federal question. What the situation would be in the event that ultimately, related non-federal questions remain unresolved need not presently concern us because it must be assumed that, given adequate means of relief in a State

[9] *Harrison* v. *NAACP*, 360 U. S. 167, 178 (1959).

forum and proper presentation of the question of State law to that forum, the State Court will not shirk its duty and will resolve the question.

A. The single-judge District Court has jurisdiction to determine the existence of a substantial Federal question before requesting the convening of a statutory three-judge Court.

In the case at bar a single-judge District Court has refused to convene a statutory Court on the ground that, because of the "tentative and hypothetical posture" (53a) of the case, he is unable to find that there exists the substantial Federal question which is an essential perequisite to the convening of the statutory Court. That a single-judge District Court has jurisdiction of this question was the purport of this Court's decision in *Ex parte Poresky*, 290 U. S. 30 (1933). In that case a motion was made in this Court for leave to file a petition for a writ of mandamus to compel the convening of a three-judge Court. Leave was denied, the Court saying (pp. 31-32):

> "[T]he provision requiring the presence of a court of three judges necessarily assumes that the District Court has jurisdiction. • • • 'A substantial claim of unconstitutionality is necessary for the application of § 266.' *Ex parte Buder*, 271 U. S. 461, 467; *Louisville & Nashville R. Co.*, v. *Garrett*, 231 U. S. 298, 304. *That provision does not require three judges to pass upon this initial question of jurisdiction.*
>
> • • •
>
> [T]he District Judge clearly has authority to dismiss for the want of jurisdiction when the question lacks the necessary substance and no other ground of jurisdiction appears."[10] (Emphasis added.)

[10] As has already been observed, the petitioner predicates jurisdiction solely on the presence of the Federal question.

See, also: *Waddell* v. *Chicago Land Clearance Commission*, 206 F. 2d 748, 749 (7th Cir., 1953); *Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372, 376 (N. D. Alabama, 1958), affd. 358 U. S. 101 (1958).

B. In the exercise of its proper jurisdiction the single-judge District Court has discretion to invoke the doctrine of abstention.

The greater power includes the lesser power. Since, as held in *Poresky, supra*, the single-judge District Court has the right to *dismiss* the complaint for want of a substantial Federal question,[11] it must necessarily have the right to invoke the doctrine of abstention and *retain* jurisdiction so that it may later have before it the "complete product" upon which it can intelligently and properly base a determination respecting the existence or non-existence of a substantial Federal question.

Indeed, this Court has already held that a single-judge District Court, in circumstances similar to those here presented, has the power to invoke the doctrine of abstention. In *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639 (1959), the appellee instituted suit in the District Court for a declaratory judgment that a State statute did not apply to it, and that, if it did, it was violative of the Federal and State Consitutions. The case was tried before a single-judge District Court on the merits and the statute was held invalid (154 F. Supp. 736 [S. D. Mississippi, 1957]). The Court of Appeals affirmed (256 F. 2d 83 [5th Cir., 1958]). The appellant moved this

[11] The Courts have continued to follow the rule in the *Poresky* case by holding that a single-judge District Court can dismiss a complaint if it presents no substantial federal question (*White* v. *Gates*, 253 F. 2d 868, 869 [D. C. Cir., 1958]; *Wicks* v. *Southern Pac. Co.*, 231 F. 2d 130, 135 [9th Cir., 1956], cert. den. 351 U. S. 946 [1956]).

Court to vacate the judgment of the Court of Appeals and remand the case to the District Court with instructions to vacate its judgment and *convene a three-judge Court* under 28 U. S. C. §§ 2281 and 2284 to consider appellee's complaint. Without passing on the merits of the motion, this Court vacated the judgment of the Court of Appeals, and remanded the case to the District Court (single-judge) with directions *to hold the cause while the parties repair to a State tribunal for an authoritative declaration of applicable State law.* It is interesting to note that in the cited case, as in the instant case, the sole predicate for Federal jurisdiction was the alleged invalidity of a State statute "as repugnant to the Constitution, treaties or laws of the United States" (p. 640). See, also: *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 252 F. 2d 317 (6th Cir., 1958); *Snyder's Drug Stores* v. *Taylor*, 227 F. 2d 162, 165 (8th Cir., 1955).

As a matter of fact, this Court has recognized the power of a single-judge District Court in this respect both before and after its decision in the *Meridian* case, *supra*. In *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168 (1942), in a suit, which was within the ambit of three-judge District Court jurisdiction, the single-judge District Court determined the question of State law which was involved (35 F. Supp. 451 [N. D. Illinois, 1940]), as did also the Circuit Court of Appeals (122 F. 2d 132 [7th Cir., 1941]). This Court vacated the judgment and remanded "the cause to the District Court [single-judge] with directions to retain the bill pending a determination of proceedings in the state Court in conformity with this opinion" (p. 173).

In *Spector Motor Service Co.* v. *McLaughlin*, 323 U. S. 101 (1944), again in a suit which fell into the jurisdiction

of a three-judge Court, the single-judge District Court decided the case on the merits, including the question of State law (47 F. Supp. 671 [D. Connecticut, 1942]). The Circuit Court of Appeals reversed the District Court, but its decision, too, was based upon a consideration of the merits (139 F. 2d 809 [2nd Cir., 1944]). This Court vacated the determination of the Appellate Court and remanded the cause to the single-judge District Court "with directions to retain the bill pending the determination of proceedings to be brought with reasonable promptitude in the State Court in conformity with this opinion" (p. 106).

Subsequent to its decision in *Meridian, supra*, the Court had before it *Louisiana Power & Light Co.* v. *City of Thibodeaux*, 360 U. S. 25 (1959), in which the District Court (single judge) ordered abstention (153 F. Supp. 515 [E. D. Louisiana, 1957]) and the Court of Appeals reversed the decision (255 F. 2d 774 [5th Cir., 1958]). This Court reversed the judgment of the Court of Appeals and reinstated the abstention order of the District Court (pp. 30-31). On the same day this Court rendered its decision in *County of Allegheny* v. *Frank Mashuda Co.*, 360 U. S. 185 (1959). Here a single-judge District Court had dismissed the suit on principles of abstention (154 F. Supp. 628 [W. D. Pennsylvania, 1957]). The Court of Appeals reversed the lower Court (256 F. 2d 241 [3rd Cir., 1958]) and this Court affirmed on the ground that the circumstances of the case did not justify abstention. The majority of the Court in this case held that the District Court had abused its discretion in invoking the doctrine of abstention. The minority were of the view that the District Court had acted within its proper discretion. What is of paramount interest here is that neither the

majority nor the minority questioned the right of the District Court to exercise its discretion in determining whether it should or should not abstain. They merely disagreed as to whether it had abused its discretion or exercised it properly.

Both *Mashuda* and *Thibodeaux*, of course, were cases in which a three-judge Court was not called for. But the point here made is that, where a single-judge District Court has conceded jurisdiction, no matter what the basis of that jurisdiction may be, it has discretion, under proper circumstances, to order abstention. Since, in the case at bar, the single-judge District Court had jurisdiction to determine the existence of a substantial Federal question, it has the subsidiary or supplemental right to determine whether the question is ripe for Federal Court consideration. If it is not, abstention can be ordered to permit the question either to be ripened or withered by State Court action.

However, the Court of Appeals, in the case at bar, has said that it is "of the opinion that the determination of whether a federal Court ought to abstain is a determination that may only be made in the first instance [in circumstances such as here] by a three-judge district court" (108a). Cited in support of this statement is this Court's opinion in *Alabama Public Service Comm.* v. *Southern Ry. Co.*, 341 U. S. 341, 350 (1951), but, we find no justification for the statement in the cited case.

Nor is there support for this position in the statutes governing procedure and jurisdiction where three-judge District Courts should properly be convened. The only restraint upon the action of the single-judge District Court is that it shall not issue an interlocutory or

permanent injunction in such cases and that such action can be taken only by a three-judge District Court (28 U. S. C. § 2281).

It is quite clear that the single-judge District Court had the power to invoke the doctrine of abstention and that its power in this respect has not been statutorily or otherwise forbidden or limited.

In holding that the single-judge Court does not have the power to abstain the Court of Appeals reasoned that a decision to abstain is different from a preliminary determination of substantiality, since abstention, not being automatic, presupposes jurisdiction that is subsequently surrendered (107a-108a). This distinction appears to have been accorded unwarranted weight. A decision to abstain is similar in many ways to the determinations of lack of substantiality and want of equity in the complaint. These dispositions are not discretionary, but are mandatory when the criteria established by this Court have been met by the facts in a particular case. (See, *e.g.*, *Harrison* v. *NAACP*, 360 U. S. 167 [1959], involving abstention; *American Federation of Labor* v. *Watson*, 327 U. S. 582 [1946], involving abstention; *California Water Service Co.* v. *City of Redding*, 304 U. S. 252 [1938], involving substantiality; *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89 [1935], involving equity.) Further, a decision on any of these grounds is addressed to the issue of whether the case may be adjudicated on the merits, and, in this sense, is a jurisdictional determination. It should also be noted that the three-judge legislation has consistently been narrowly construed to avoid the draining of judicial manpower that would be occasioned by unnecessary conventions of three-judge Courts. (*E.g.*, *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368 [1949]; *Phillips* v. *United States*, 312 U. S.

246 [1941].) The major reason for the existence of three-judge Courts is to provide more deliberate decisions on constitutional questions, and it follows that a case should not be presented to such a Court until a single-judge Court has deemed it ripe for adjudication on the merits. Therefore, since it is well established that a single-judge District Court has the power to determine the jurisdiction of a Federal District Court, the foregoing considerations support the conclusion that the inquiry of whether to abstain may be conducted by a single-judge as well as by a three-judge Court.

C. Where, as here, a question under the Federal Constitution is dependent upon the resolution of an uncertain point of State law, the State remedy being adequate, the District Court properly exercised its discretion in invoking the doctrine of abstention.

The petitioner, a New York corporation, conducts business from premises which it occupies at the Idlewild Airport in New York under a lease which provides that the demised premises may be used as an office for the receipt of orders for export of United States customs bonded wines and liquors. The wines and liquors sold by the plaintiff are not for consumption in the State of New York. The demised premises are under the supervision of the Bureau of Customs. The wines and liquors sold are purchased solely for export from vendors who withdraw the goods from Class 6 United States Customs bonded warehouses for rewarehousing at the United States Customs-controlled space in petitioner's leased premises. The design and purpose of the method of operation is to prevent diversion of the bonded merchandise to any use other than export from the United States.

Petitioner receives orders and payment at its premises at the airport from passengers departing by non-stop planes destined for foreign countries. The merchandise is delivered to the air line with approved documents for foreign export, delivery to be made to the passenger-purchaser only upon arrival at the foreign destination. The United States Treasury Department has approved these procedures. (Complaint; 1a-14a.)

The Attorney General of the State of New York has ruled that the business of the petitioner constitutes "sales" or "selling" within the meaning of New York State Alcoholic Beverage Control Law § 3(28), that that law contains no provision which would authorize issuance of a license to petitioner to conduct its business, and that under § 100(1) of the State Law no person is permitted to sell any alcoholic beverage within the State without a license (1960 Op. Atty. Gen. 8, dated June 30, 1960; 21a-24a).

Petitioner urges that the New York statutes, as sought to be applied to it, are repugnant to (a) the commerce clause, (b) the clause prohibiting a State from laying imposts or duties on imports or exports without the consent of Congress, and (c) the supremacy clause of the constitution and, therefore, are unconstitutional. These contentions rest on the claim that the Tariff Act of 1930 as amended, and the regulations adopted thereunder, taken together with the applicable provisions of the Internal Revenue Code, constitute a comprehensive, exclusive and pre-emptive scheme duly adopted by Congress for the regulation, encouragement and promotion of foreign commerce in, and export of, bonded wines and liquors.

1. Regulation of the liquor traffic in the State by the State is paramount to the Federal Government's right to regulate whether under the constitutional provisions governing commerce, exports and imports, and supremacy, or under statutory and regulatory provisions of a preemptive character.

Basic to the consideration of this question is the Twenty-first Amendment to the Federal Constitution (repeal of the Eighteenth Amendment). Section 2 of the Amendment reads as follows:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Of relevance also in this connection is the *Webb-Kenyon Act* (27 U. S. C., ch. 6), dealing with the transportation of intoxicating liquors in interstate commerce. Section 121 reads as follows:

> "All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, *sale* or *storage* therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by being introduced therein in original packages or otherwise" (Emphasis added).

The interpretation of the Twenty-first Amendment is, of course a Federal question, and the relationship thereunder of State rights of regulation to Federal rights asserted under other provisions of the Constitution may be and has been considered by this other Federal Courts.

In *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59 (1936), this Court held that under § 2 of the

Twenty-first Amendment the State's power of regulation of the liquor traffic is paramount to the Federal Government's control over interstate commerce. It was expressly held that United States Constitution, Art. 1, § 8, cl. 3 may be overridden by State legislation regulating transportation and commerce in liquor.

In *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132 (1939), the appellant argued, *inter alia*, that, despite the Twenty-first Amendment, exports remain subject to the commerce clause and free of State regulations. This Court affirmed the lower Court's rejection of the appellant's argument, saying (p. 138):

> "The Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause. Without doubt a State may absolutely prohibit the manufacture of intoxicants, their transportation, sale or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them. [Citing cases].
>
> Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions? Former opinions here make an affirmative answer imperative."

In *Carter* v. *Virginia*, 321 U. S. 131 (1944), a judgment sustaining the validity of a State statute regulating transporation of intoxicating liquor through the State (interstate commerce) was affirmed. In a concurring opinion, Mr. Justice Frankfurter said (pp. 140-141):

> "The legislation is sustainable under the Twenty-first amendment on one of two considerations. It is a notorious fact that State prohibition laws were to no small measure evaded by illicit diversion of liquor

> claimed to be transported through a State. Since we are dealing with a constitutional amendment that should be broadly and colloquially interpreted, liquor that enters a State in the manner in which the liquor here came into Virginia may, without undue liberty with the English language, be deemed to be for 'delivery' there even though it is consigned for another state. The Twenty-first Amendment prohibits the 'transportation or importation into any State * * * of intoxicating liquors, in violation of the laws thereof,' not when the liquor is for delivery *and* use but for 'delivery *or* use therein.' In other words, liquor need not be intended for consumption in a State to be deemed to be imported into the State and therefore subject to control by that State." (Emphasis by Mr. Justice Frankfurter.)

And in *United States* v. *Renken*, 55 F. Supp. 1 (W. D. South Carolina, 1944), affd. 147 F. 2d 905 (4th Cir., 1945), cert. den. 326 U. S. 734 (1945), the Court said (pp. 6-7):

> "Under the 21st Amendment it is entirely up to the state whether liquor can be imported into, or delivered or used within its borders. Since it can prohibit, it may permit under such terms as it sees fit, untrammeled by the due process clause, * * * the equal protection clause, * * * or the commerce clause of the Constitution, * * *."

See also: *Mahoney* v. *Triner Corp.*, 304 U. S. 401, 404 (1938); *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U. S. 391, 394 (1939); *Dunn* v. *United States*, 98 F. 2d 119, 121 (10th Cir., 1938); *Hayes* v. *United States*, 112 F. 2d 417 (10th Cir., 1940); *Johnson* v. *Yellow Cab Transit Co.*, 137 F. 2d 274, 275 (10th Cir., 1943), affd. 321 U. S. 383 (1944); *Washington Brewers Institute* v. *United States*, 137 F. 2d 964, 966-967 (9th Cir., 1943), cert. den. 320 U. S. 776 (1943); *Jatros* v. *Bowles*, 143 F. 2d 453, 455 (6th Cir., 1944); *General Sales & Liquor Co.* v. *Becker*, 14 F. Supp. 348, 349-350 (E. D. Missouri, 1936); *Wylie* v. *State Board of Equalization*, 21 F. Supp. 604, 605 (S. D. California, 1937).

In *California* v. *Washington*, 358 U. S. 64 (1958), a case arising under the original jurisdiction of this Court, motion was made for leave to file a bill of complaint. The undersigned appeared on behalf of the State of New York, as *amicus curiae*, in support of the bill, and contended that the Twenty-first Amendment did not subordinate Federal rights arising under the commerce clause to State regulatory rights. We specifically requested the Court to overrule its decision in *State Board of Equalization* v. *Young's Market Co., supra.* The Court rejected our argument and denied leave to file the bill.

Stated succinctly and by way of summary of the Federal view on this point, the classification of paramount State power recognized by the Twenty-first Amendment cannot be deemed forbidden by Article I, § 8, Cl. 3, Art. I, § 10, Cl. 2, or the Supremacy clause (Art. VI) any more than such classification can be deemed forbidden by the Fourteenth Amendment (*State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59, 64 [1936]).

Incidentally, it may be noted that in the papers in support of its application for a preliminary injunction the petitioner, by its president, alleged as follows (36a):

> "The bonded, tax-free wines and liquors, from the time they are withdrawn from these bonded warehouses *to the time they are loaded on the carrier*, remain in the continuous custody and under the continuous supervision of the Bureau of Customs." (Emphasis added.)

It may be observed that from the time the merchandise is loaded on the plane to the time of actual departure it is literally physically in New York State and concededly under no direct governmental supervision or control. Constructively, at least, the merchandise may be considered "delivered" at this moment, even though it is assumed that it has not been delivered prior to that moment.

This point, as has already been stated, is a Federal question as to which the Federal Courts have very definitely and explicitly expressed their views. Any decision of a New York Court to the contrary (such as *Rosenblum* v. *Frankel*, 279 App. Div. 66, 108 N. Y. S. 2d 6 [1st Dept., 1951]) is not binding upon this Court. In any event, the other cases cited by the petitioner[12] may be distinguished from the case at bar.

In *Matter of Gulf Oil Corp.* v. *McGoldrick*, 256 App. Div. 207, 9 N. Y. S. 2d 544 (1st Dept., 1939), affd. 281 N. Y. 647, 22 N. E. 2d 480 (1939), affd. 309 U. S. 414 (1940), the Court disallowed a city sales tax on oil held in bonded warehouses, class 6, on the ground that this was an unconstitutional interference with foreign commerce. But this case dealt with *oil*—not *liquor*. The impact of the Twenty-first Amendment was not present in this case.

In *During* v. *Valente*, 267 App. Div. 383, 46 N. Y. S. 2d 385 (1st Dept., 1944), the decision, holding that liquor stored for export purposes in a Foreign Trade Zone, an isolated, enclosed and policed area under the supervision of a designated board of Federal officials, created under Federal statute (19 U. S. C., ch. 1A, §§ 81a *et seq.*) and pursuant to agreement entered into *under State statutory authorization* (L. 1935, ch. 246), was free of State regulation, is wholly different from a situation such as appears in the case at bar where the liquor, though under bond, is on the petitioner's private premises in one of the buildings in the Idlewild Airport in New York State. All that was held in the *During* case was that the Foreign Trade Zone, erected in the Port of New York by the city under 19 U. S. C. §§ 81a *et seq.*, was created under the exclusive and plenary power of Congress to regulate commerce with

[12] At pages 40-43 of its brief.

foreign nations, notwithstanding the fact that the zone was within the geographical limits of the State of New York. The statute which authorized the City of New York to make application to the Federal Board under the Foreign Trade Zone Act (L. 1935, ch. 246) expressly provided that if the application were granted, the city was "to establish, operate and maintain such zone in accordance with law" (*i. e.*, with the governing Federal law). This may be construed to constitute a legislative surrender by the State of the right to enforce State regulations in that area in much the same fashion as a cession of sovereignty to the Federal Government concededly effects that result with respect to other Federal enclaves.

As bearing upon the State's view of its rights in the Foreign Trade Zone the Court's attention is called to *New York Operators* v. *State Liquor Authority*, 285 N. Y. 272, 34 N. E. 2d 316 (1941), in which the State Court of Appeals said (p. 277):

> "[T]he foreign distilled spirits * * * are brought into the trade zone [*i. e.*, the Foreign Trade Zone] from abroad, and are treated by the Federal Government as foreign commerce which has not entered the United States, that is, the same as if it were still on the high seas."

The Court held that an action for a declaratory judgment could be brought to determine whether the State has the constitutional power to control and tax merchandise brought into the trade zone from abroad.

Matter of Birner v. *Santa Lucia Wineries, Inc.*, 155 Misc. 722, 282 N. Y. Supp. 257 (Sup. Ct., New York Co., 1935), involved a shipment of wine in interstate commerce, the seller being a nonresident of New York State and not licensed therein, to a New York purchaser, delivery being made f. o. b. at a point outside New York State. The sale,

however, was made in New York State by the resident purchaser with an authorized representative of the non-resident seller. The Court held that, though interstate in character, the sale took place in New York State and was violative of the State statute which required that a seller of wine in New York State be licensed by the State Alcoholic Beverage Control Board.

The conclusion is inescapable as to this purely Federal question. The language of the Twenty-first Amendment is clear. Under it the states are free to enact laws concerning the transportation within, or the importation into the states or the exportation out of the states, of alcoholic beverages, unfettered by the power delegated to the Federal Government to regulate commerce among the states and with foreign powers. This does not deny to the Federal Government the right to exercise its acknowledged jurisdiction in the field of interstate and foreign commerce so long as such jurisdiction is considered supplemental to the jurisdiction of the State. The Federal Government, however, must exercise its rights in subservience to, and not in hostility to, or denial of, the paramount State rights.

The cases cited by the petitioner, which support the view that the State cannot tax merchandise in interstate or foreign commerce, or the cases in which State interference is predicated upon powers other than those which arise under the Twenty-first Amendment (licensing of motor vehicles, for example), it being merely coincidental that the merchandise affected consists of wines and liquors, are not relevant to this point. Such State powers do not deal with the police power reserved to the states under the Twenty-first Amendment. They deal with the taxing power and the police power generally. Concededly, such powers of the State are subordinate to the Federal powers because as to such powers the wines and liquors are considered

merely as merchandise generally. Regarded as such, the Federal power is supplemental to and not in hostility to that part of the State's police power as is constitutionally rendered invulnerable and absolute under the Twenty-first Amendment. The petitioner's assertion that the Federal controls render the licensing requirements of the State law a nullity is a definite assertion of hostility and cannot be sustained.

2. Under the circumstances of this case an order of abstention constituted a proper exercise of discretion.

Petitioner has brought the instant action for a declaratory judgment adjudging that the State statutes, as sought to be applied to the petitioner, are unconstitutional under the Federal Constitution. It seeks also an interlocutory and permanent injunction. Intertwined with the constitutional question is an uncertain point of State law: Do the transactions in which the petitioner is involved, as vendor, at its premises in the Idlewild Airport constitute "sales" within the meaning of New York Alcoholic Beverage Control Law §§ 3(28) and 100(1)? Until this preliminary State question is resolved the Federal Court is unable to determine whether a Federal constitutional question has been presented or not.

The case at bar furnishes the clearest instance of a case in which abstention is justified—where State action is challenged in a Federal Court as contrary to the Federal Constitution and there is a question of uncertain State law present in the case. In *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496 (1941), the progenitor of this line of cases, the company sought to enjoin enforcement of a Commission order. In addition to the Federal constitutional question presented, there was a substantial question of

State law as to whether the Commission had been statutorily empowered to make the order in question. Although, by reason of the jurisdiction of the Federal Court which follows upon the existence of a Federal question, the Federal Court also possesses ancillary jurisdiction to decide State issues (*Siler* v. *Louisville & N. R. R.*, 213 U. S. 175 [1909]), the wisdom of exercising such ancillary jurisdiction is doubtful. As this Court said in the *Pullman* case, *supra* (p. 500):

> "In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. • • • The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication."

As this Court said in *Harrison* v. *NAACP*, 360 U. S. 167 (1959) at page 177:

> "[T]his principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication."

The Court continued (p. 178):

> "We do not intimate the slightest view as to what effect any such determinations might have upon the validity of these statutes. All we hold is that these enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality, so that federal judgment will be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court."

For these important reasons the abstention doctrine has been applied in many cases where Federal constitutional

questions are intermingled with questions of State law. For example: *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168, 171-173 (1942), in an injunction action to prevent allegedly unconstitutional interference with plaintiff's sale of milk in a particular type container, there was a question as to whether, as a matter of State law, the city had the power to prohibit the container; *Spector Motor Service Co.* v. *McLaughlin*, 323 U. S. 101, 104-106 (1944), in a suit attacking a State tax as unconstitutional, there were questions of State law as to whether the statute applied to the appellant and what it was the State was seeking to tax; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450 (1945), involving questions as to the interpretation of a State act regulating certain labor unions, which were challenged as unconstitutional; *American Federation of Labor* v. *Watson*, 327 U. S. 582, 595-596, 598 (1946), State right to work law, attacked as unconstitutional, had not yet been construed by the State Court; *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368 (1949), territorial statute, not yet construed by territorial Courts, attacked as unconstitutional, regulating teaching in foreign language schools; *Shipman* v. *Du Pre*, 339 U. S. 321, 322 (1950), suit for a declaratory judgment that a State statute, not yet construed by the State Courts, regulating the fisheries and shrimping industry, was unconstitutional; *Albertson* v. *Millard*, 345 U. S. 242, 244, 245 (1953), injunction action against enforcement of a State Communist Control Act not yet construed by the State Courts; *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220 (1957), claim by United States in action to quiet title that an unconstrued State statute if applicable to the United States, was unconstitutional; *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639 (1959), State statute challenged as unconstitutional under both State and Federal Constitutions; *Harrison* v.

NAACP, supra, State Courts had not yet construed State statute affecting plaintiff association, enforcement of which plaintiff sought to enjoin on constitutional grounds. See also: *Government & Civic Employees Organizing Committee, CIO* v. *Windsor,* 116 F. Supp. 354 (N. D. Alabama, 1953), affd. 347 U. S. 901 (1954); *Government & Civic Employees Organizing Committee, CIO* v. *Windsor,* 353 U. S. 364, 366 (1957). In the latter case this Court ordered a second abstention, stating:

> "The bare adjudication by the Alabama Supreme Court that the union is subject to this Act does not suffice since that Court was not asked to interpret the statute in the light of the constitutional objections presented to the District Court."

The controlling policy governing abstention is that a Federal Court will not decide a constitutional question where decision can go on other grounds. In *Louisiana Power & Light Co.* v. *City of Thibodeaux,* 360 U. S. 25 (1959), the Court wrote broadly of the District Court "exercising a fair and well-considered judicial discretion in staying proceedings" (p. 30). Setting the boundaries of this discretion is not difficult. We confidently submit that the District Court *must* stay the case and order abstention, pending State adjudication of the State issue, where a Federal constitutional question is intermingled with unsettled questions of State law. Here the line of decisions, stemming from *Pullman,* is clear and compelling, and reflects not only the policy of avoiding unnecessary interference in State affairs which underlies abstention generally, but also the policy that Federal Courts will not decide Federal questions so long as the cases can be decided on other grounds. Indeed, in *Louisiana P. & L. Co.* v. *Thibodeaux,* this Court, 360 U. S., at page 28, referred to the fact that in *Leiter Minerals, Inc.* v. *United States, supra,*

> "[W]e have *required* District Courts, and *not merely sanctioned* an exercise of their discretionary power, to stay their proceedings pending the submission of the state law question to state determination." (Emphasis added.)

(a) There has been no State adjudication of the State question involved herein.

It is conceded that abstention is inappropriate where the State law is settled. In such event, even though the Federal constitutional questions which the case may raise are serious, the Federal Court must proceed to a decision, since no useful purpose is served by remitting the parties to a State Court (*Public Utilities Comm. of Calif.* v. *United States*, 355 U. S. 534 [1958]; *City of Chicago* v. *Atchison, T. & S. F. R. R.*, 357 U. S. 77 [1958]).

The petitioner asserts that the State law question has already been settled by the New York Courts (Point V, Petitioner's Brief, pp. 40-43). But the petitioner has misconceived the issue of "State" law which is involved herein. It states the question as one involving the inapplicability of State regulation to matters under the alleged superior Federal jurisdiction. This, however, is a Federal question which has already been discussed under Sub-point C 1, *supra*.[13]

The true State question which is inherent in this case and which must be decided by the State Courts before the constitutional question is ripe for consideration by the Federal Courts is: Do the transactions in which the petitioner is involved, as vendor, at its premises in the Idlewild Airport constitute "sales" within the meaning of New York Alcoholic Beverage Control Law §§ 3(28) and

[13] Pages 18-25 of this Brief.

100(1)? The Attorney General of the State of New York has ruled that they do constitute "sales" as defined in the statutes (21a-24a). It is conceded, however, that there has been no judicial adjudication of the question in New York. The petitioner cites no cases on this point and we have been unable to find any.

(b) The State remedy is adequate.

The petitioner has a completely adequate remedy available in the State Courts for the resolution of the State question by way of an action for a declaratory judgment. This was decisively determined in *New York Operators* v. *State Liquor Authority*, 285 N. Y. 272, 34 N. E. 2d 316 (1941), wherein the Court said (pp. 276-277):

> "The can be no doubt that the necessary jural relation exists between plaintiff and defendants. Enforcement of the State Alcoholic Beverage Control Law (Cons. Laws, ch. 3-B) and the power to issue licenses thereunder is vested in the State Liquor Authority.
>
> • • • By this action plaintiff seeks a determination whether it must procure such a license in order to perform the acts described in the complaint. The necessity of a license may be the subject of an action for a declaratory judgment."

The petitioner, however, predicates its claim that the relief is inadequate upon the fact that it will sustain irreparable harm unless the respondents, Rohan *et al.*, are restrained from any action that they might take to enforce the statute against it. It points to the fact that under the State's Alcoholic Beverage Control Law (§ 121) it is limited to a 30-day stay. It is conceded also that, by virtue of 28 U. S. C. § 2281, the single-judge District Court, has no power to grant a stay pending abstention. However, we do not hesitate to assure the Court, and we have been

authorized by the State Liquor Authority to make such assurances, that the respondents, constituting the State Liquor Authority, will refrain from instituting enforcement proceedings until, or base penalties on conduct occurring before, the dispute is settled. With such assurances there can be no question regarding the adequacy of the State remedy (*Harrison* v. *NAACP*, 360 U. S. 167, 179 [1959]).

Furthermore, the argument of the petitioner as to the inadequacy of its remedy in the State Courts by reason of the 30-day limitation as to any stay of enforcement, as provided in Alcoholic Beverage Control Law § 121, is without any basis, legally or factually, because the petitioner's cause of action does not arise under § 121. That section reads as follows:

> "§ 121. Review by courts.
>
> The following actions by the liquor authority shall be subject to review by the supreme court in the manner provided in article seventy-eight of the civil practice act or by any other appropriate remedy provided that no stay shall be granted pending the determination of the matter except on notice to the liquor authority and for a period not exceeding thirty days:
>
> 1. Refusal by the liquor authority to issue a license or a permit.
>
> 2. The issuance of a license or permit by the liquor authority contrary to the recommendations of a local board.
>
> 3. The issuance of a license or permit by the liquor authority where the recommendation of a local board was not unanimous.
>
> 4. The revocation, cancellation or suspension of a license or permit by the liquor authority.
>
> 5. The failure or refusal by the liquor authority or a local board to render a decision within the time required by section one hundred twenty.

6. The transfer by the liquor authority of a license or permit to any other premises, or the failure or refusal by the liquor authority to approve such a transfer.

7. The issuance of an order of warning by the liquor authority.

8. Refusal to approve alteration of premises."

The petitioner's complaint does not arise from an adverse determination of the State Liquor Authority within its conceded general jurisdiction or within the specific category of reviewable determinations as set forth in § 121. Rather it is based upon an assertion that the Authority is *without jurisdiction* to act either way by reason of the alleged paramount and pre-emptive rights of the petitioner under Federal law. The latter action is not one which is brought under § 121 and is not subject to the limitations of that section. Rather, the action in the State Courts would be brought under New York's Civil Practice Act, § 473, which provides that:

"The supreme court shall have power in any action or proceeding to declare rights and other legal relations on request for such declaration whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment. Such provisions shall be made by rules as may be necessary and proper to carry into effect the provisions of this section."

New York Operators v. *State Liquor Authority*, 285 N. Y. 272, 34 N. E. 2d 316 (1941), held that an action for a declaratory judgment may be brought against the State Liquor Authority.

The forms, practice and rules applicable to other actions in the Supreme Court have been made applicable to actions for a declaratory judgment (Rules of Civil Procedure, Rule

210). The relevant provisions of New York's Civil Practice Act respecting the right to enjoin the respondents, Rohan *et al.*, pending determination of the State litigation, are §§ 877 and 879. Section 877 provides as follows:

> "Where it appears from the complaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act, the commission or continuance of which during the pendency of the action would produce injury to the plaintiff, an injunction order may be granted to restrain it. The case provided for in this section is described in this act as a case where the right to an injunction depends upon the nature of the action."

Section 879 reads:

> "Where a duty is imposed by statute upon a state officer or board of state officers, an injunction order to restrain him or them, or a person employed by him or them, from the performance of that duty, or to prevent the execution of the statute, shall not be granted except by the supreme court at a term thereof sitting in the department in which the officer or board is located or the duty is required to be performed; and upon notice of the application therefor to the officer, board or other person to be restrained."

Thus, it clearly appears that the petitioner may obtain an injunction *pendente lite* in the State Courts if it demonstrates in the State proceeding that it is properly entitled thereto. Under these circumtances the petitioner cannot properly assert that the State remedy is inadequate because it may be subjected to irreparable harm by reason of the fact that enforcement of the statute cannot be temporarily stayed.

(c) The fact that no State action is pending is not an impediment to the invocation of the doctrine of abstention.

Petitioner asserts that power to abstain may not be exercised where no State action is presently pending (Petitioner's Brief, pp. 21-22). But this is contrary to many cases of this Court which have directed abstention pending disposition of the question of State law by the State Courts in an action to be brought thereafter.

For example: *Albertson* v. *Millard*, 345 U. S. 242 (1953), where the lower Court was directed (p. 245)

> "to hold the proceedings in abeyance a reasonable time pending construction of the statute by the state courts either in pending litigation or *other litigation which may be instituted.*" (Emphasis added.)

See also, *Spector Motor Service Co.* v. *McLaughlin*, 323 U. S. 101 (1944), wherein the Court remanded the cause to the District Court (p. 106)

> "with directions to retain the bill pending the determination of proceedings *to be brought* with reasonable promptitude in the State court in conformity with this opinion." (Emphasis added.)

D. The petition for a writ of mandamus to compel the convening of a statutory three-judge District Court is premature.

In view of the fact that the single-judge District Court has jurisdiction to determine the substantiality of the Federal question, which is the sole ground alleged to confer jurisdiction, as an essential prerequisite to the convening of a statutory three-judge Court, and in view of the fact that the substantiality of the Federal question is not ripe for consideration by the single-judge District Court

until an intermingled matter of State law is first settled by the State Courts, it is clear that the single-judge District Court is not presently in a position nor does it have jurisdiction to convene a statutory three-judge District Court.

Under such circumstances it is obvious that the petition for a writ of mandamus to compel the convening of a statutory three-judge Court is premature and the petition should be dismissed.

POINT II

The petition for certiorari to review the decision of the Court of Appeals should be dismissed, as having been improvidently granted, because, either both Courts below were without jurisdiction, or jurisdiction being present, abstention could be ordered by a single-judge District Court.

A. Assuming jurisdiction in the single-judge District Court, the Court of Appeals should have affirmed the order of the District Court instead of dismissing the appeal. The results, however, are identical.

Point I of this brief establishes, we believe, the following propositions:

(a) That the single-judge District Court had jurisdiction to determine the substantiality of the Federal question which was the sole basis for jurisdiction;

(b) That the determination of substantiality by the single-judge District Court was an essential prerequisite to the convening of a statutory three-judge District Court;

(c) That in order to determine the question of substantiality of the Federal jurisdictional question the single-

judge District Court possessed the power to order abstention pending the disposition of an intermingled question of State law by the State Courts;

(d) That in the circumstances of this case the single-judge District Court properly exercised its discretion in ordering abstention.

Since, as demonstrated in Point I, the single-judge District Court had jurisdiction, the Court of Appeals likewise had jurisdiction. Its dispositive action, therefore, despite the motion made by the respondent, Rohan *et al.*, to dismiss the appeal, should have been to affirm the decision of the Court below rather than to dismiss the appeal.

In view of the fact, however, that the ultimate result upon dismissal of the appeal is identical with the ultimate result which would have ensued upon an affirmance, the petition for certiorari should be dismissed.

B. Assuming lack of jurisdiction in the single-judge District Court, the Court of Appeals, likewise, had no jurisdiction to hear the appeal. In dismissing the appeal the Court did exactly what this Court would have directed it to do.

The petitioner seeks to restrain the respondents, Rohan *et al.*, from enforcing certain State statutes against it.

Assuming, *arguendo*, that the power to abstain resided exclusively in a statutory three-judge District Court, as was held herein by the Court of Appeals (108a),[14] it would follow, as the Court of Appeals held, that a single-judge District Court was without jurisdiction to order abstention. It would also follow that the Court of Appeals, too, under such circumstances would be without jurisdiction to enter-

[14] We have demonstrated the error of this view in Point IB, *supra*, pp. 11-16.

tain an appeal from such order and would be constrained to dismiss the appeal. That is exactly what the Court of Appeals held and did upon the authority of this Court's decision in *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10 (1930).

In *Stratton* this Court said (p. 16):

> "Nor does an appeal lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this Court."

A petition to this Court for certiorari is the very height of futility because in the *Stratton* case this Court held that if an order of a single-judge District Court, failing to convene a three-judge District Court, is appealed to a Court of Appeals, which fails to correct the jurisdictional error, and review is then sought in this Court of the decision of the Court of Appeals, this Court will reverse the decree of the Court of Appeals and remand the case to that Court with directions to dismiss the appeal for want of jurisdiction. That, however, is exactly what the Court of Appeals has already done.

Almost identical with the situation in the case at bar was *Green* v. *Clancy*, 350 U. S. 910 (1955). In this case action was brought to enjoin State officers from enforcing a State statute against the petitioner. The latter moved for the convening of a three-judge District Court. The respondents' cross-motion to dismiss the complaint on the grounds that a substantial federal question was not presented, that a plain, speedy and efficient remedy was available in the New York Courts, and that construction of the

State statute should first be determined by the New York Courts, was granted by the single-judge District Court. On the basis of the foregoing this Court denied a motion for leave to file a petition for writs of prohibition and mandamus.

POINT III

Alternatively, this Court, as a practical solution, may grant the petition for mandamus and remand the case to the single-judge District Court with instructions to cause the convening of a statutory three-judge Court. Further instructions may be given by this Court to the statutory Court directing it to abstain from further proceedings but to retain jurisdiction pending determination of the State question by the State Courts.

The petitioner, asserting a threatened infringement of its rights under the Federal Constitution, may have a cause of action which it can assert in the Federal Courts. It should not be foreclosed from bringing such suit nor should it be subjected to irreparable harm pending the judicial determination of those rights. On the other hand, the Federal Court, whether single-judge or three-judge in character, cannot be asked to adjudicate the Federal question until an inextricably intermingled State question is first adjudicated by the State Courts.

Unfortunately, the parties and the lower Courts have become enmeshed in a maze of complexities relating to jurisdiction and procedure. However, like Alexander the Great, this Court, as a practical solution, can cut the "Gordian knot" by making the following order:

(a) Grant the petition for mandamus;

(b) Remand the case to the single-judge District Court with instructions to cause the convening of a statutory three-judge District Court;

(c) Direct the statutory three-judge District Court to retain jurisdiction, but stay further proceedings pending the disposition of the related question of State law by the State Courts.

If the alternative disposition which has been suggested is adopted by the Court reliance need not be had on the voluntary assurances of the respondents, Rohan *et al.*, to refrain from enforcement action nor on interlocutory restraint by the State Courts. Under the suggested alternative procedure the statutory three-judge District Court has undoubted power to restrain such action *pendente lite* (28 U. S. C. §§ 2281 and 2284).

Similarly, if the alternative procedure is adopted, it becomes unnecessary for the Court to determine whether the single-judge District Court has the power, in the first instance, to order abstention.

CONCLUSION

The petition for a writ of mandamus should be dismissed. The petition for writ of certiorari should be dismissed, as having been improvidently granted. Alternatively, the case should be remanded with instructions to convene a statutory Court and with directions to the statutory Court to order abstention pending State Court adjudication of the related question of State law.

Dated: Albany, New York, December 15, 1961.

Respectfully submitted,

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Appendix

28 U. S. C. § 1254(1)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *"

28 U. S. C. § 1651(a)

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U. S. C. § 2281

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

28 U. S. C. § 2284

"* * *

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the Trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction

or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State."

New York Alcoholic Beverage Control Law

(Consol. Laws, Chap. 3-B)

"§ 3. Definitions.

* * *

28. 'Sale' means any transfer, exchange or barter in any manner and by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state."

"§ 100. Alcoholic beverages generally.

1. No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter.

* * *"

"§ 105. Provisions governing licensees to sell at retail for consumption off the premises.

* * *

2. No premises shall be licensed to sell liquors and/or wines at retail for off premises consumption, unless said premises shall be located in a store, the entrance to which shall be from the street level and located on a public thoroughfare in premises which may be occupied, operated or conducted for business, trade or industry or on an arcade or sub-surface thoroughfare leading to a railroad terminal."

New York Session Laws.

L. 1935, ch. 246

"Section 1. The city of New York is hereby authorized to make application to the board established by the act of congress, approved June eighteenth, nineteen hundred thirty-four, entitled 'An act to provide for the establishment, operation and maintenance of foreign trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,' for a grant to such city of the privilege of establishing, operating and maintaining a foreign trade zone in the borough of Richmond within such city, pursuant to the provisions of such act, and if such application be granted, to accept such grant and to establish, operate and maintain such zone in accordance with law. The authorization hereby granted shall extend to and cover any application heretofore made for such purpose by the city of New York pursuant to the act of congress hereinbefore described, and to any amendment of such an application."

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Supreme Court of the United States

October Term, 1961

No. 138

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,
Respondents.

Misc. 180

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

HONORABLE ALEXANDER BICKS, HONORABLE EDWARD J. DIMOCK, HONORABLE JOHN M. CASHIN, JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The respondents' brief is extraordinary in many respects, particularly in its interjections of wholly new contentions and in its contradictions of their contentions below.

I

The Respondents' "Practical Solution"

In the first place, as a so-called "practical solution" (pp. 8, 38), the respondents' brief now *for the first time* advances the suggestion that this Court, whose jurisdiction is for the correction of errors, "enter an order" which of necessity would predicate as erroneous:

> (1) The respective refusals of Judges Bicks, Dimock and Cashin to convene forthwith a statutory court pursuant to 28 U. S C. §§2281, 2284.
>
> (2) The respondents' own contention throughout the courts below that no substantial federal question sufficiently appeared to require the immediate convening of a statutory court to determine the petitioner's rights, including its motion for a temporary injunction.
>
> (3) The respondents' own contention from the first that "abstention constituted a proper exercise of discretion" by Judges Bicks, Dimock and Cashin.
>
> (4) The decision of the Court of Appeals that it was powerless to grant the petitioner any relief or protection at all.

Thus the respondents have at last argued themselves into denying their own motion to dismiss for insufficiency and lack of jurisdiction (42a).

To these ends the respondents' brief states that "the order" to be entered by this Court should (pp. 8, 38):

> (a) "Grant the petition for mandamus".
>
> (b) Direct the single-judge District Court to convene a statutory court forthwith.
>
> (c) Direct the statutory court "to retain jurisdiction", but stay further proceedings until the state

courts had disposed of the alleged "related question of State law".

By way of predicating jurisdiction in this Supreme Court to enter such an order, the respondents' brief now acknowledges *for the first time* (p. 38):

> "The petitioner, asserting a threatened infringement of its rights under the Federal Constitution, may have a cause of action which it can assert in the Federal Courts. It should not be foreclosed from bringing such suit nor should it be subjected to irreparable harm pending the judicial determination of those rights."

Thus, among the many serious anomalies into which the respondents' "practical solution" would invite this Court, not the least serious would be the issuing of a directed decision to a court which as yet has no existence, has not heard the parties, and has made no decision from which appeal to this Court would lie,—an anomaly compounded by the fact that any hypothetical appeal in the future would already have been decided by this Court in advance of the decision to be appealed from.

Compounding these anomalies further would seem beyond ingenuity, yet the respondents succeed in so doing when they close their "practical solution" by interjecting into it the self-contradiction (p. 39) that thereby it "becomes unnecessary for the Court to determine whether the single-judge District Court has the power, in the first instance, to order abstention".

But how could this Court issue to such single judge its mandamus to convene the statutory court immediately, except by determining that the single-judge court had no power to do otherwise?

Finally, implicit in the last-minute making of this "practical solution" is the evident recognition by the re-

spondents that the results thus far have not been "fair" (p. 8), and that their injustice (as usual with injustice) is pregnant with illegalities. Yet for precisely those not "fair" results have the respondents themselves been strenuously, and thus far successfully, contending in all the courts below.

Hence, we cannot read their last-minute "practical solution" otherwise than as a confession of errors, or at least as an educated anticipation of this Court's corrections of errors.

II

The Twenty-First Amendment

(1) The respondents' brief is also extraordinary in its interjection of another wholly new contention.

Now, a year and a half after the commencement of this much litigated action, the respondents claim *for the first time* the Twenty-first Amendment.

On page 3 the respondents' brief places first in its "Questions Presented" this:

> "1. Are the operations of the petitioner subject to paramount control of the State by virtue of the Twenty-first Amendment to the Federal Constitution?"

Not even in their brief opposing the petitioner's application for leave to come to this Court had such a "Question" been advanced by them.

(2) Precisely as in the case of their "practical solution", this second wholly new after-thought entangles the respondents in self-contradictions and anomalies.

If before any of three single judges in the District Court or before the Court of Appeals, the respondents had put forward this "Question" as to the applicability of

the Twenty-first Amendment, then they themselves would have demonstrated at the very threshold of the action the presence of a preeminently substantial and primary federal constitutional question,—contrary to all their claims heretofore that no such substantial question as yet appeared.

Indeed, the respondents' own brief *now* asserts as to their belated discovery of the Twenty-first Amendment (p. 22):

> "This point, as has already been stated, is a federal question * * *."

Such a "question" is by its very nature one which demands forum in the federal courts.

(3) But the short answer is that the Twenty-first Amendment has no application whatever to this national and international plan enacted by Congress for foreign exports of wines and liquors in reciprocity with foreign governments and for the consequent betterment of our national economy and our economic relations with other nations.

The Amendment has no application to liquor which, for such purpose and pursuant to such enactment, originates under the control and custody of the United States, is labelled "Bottled for export from the U. S. A.", and moves under such continuous control and custody through designated and authorized export channels to its intended delivery on foreign soil (2a-6a, 36a-38a).

Indeed the very opinion of the State Attorney General on which the Liquor Authority relies concedes that "delivery is not made within the State" (22a).

(4) The facts pleaded are admitted, since respondents' sole attack was by motion to dismiss for failure "to state a claim" (42a).

Moreover, those facts are rendered indubitable by the federal statutes and regulations elaborately reproduced in

the record (17a-20a, 150A-185A), and by the certificate of the U. S. Treasury Department, Bureau of Customs, dated April 15, 1958, that the *sole* business which the petitioner transacts (2a, 39a-40a) is a lawful and approved "exportation of the merchandise within the meaning of Section 311 of the Tariff Act" (15a, 16a, 37a).

These admitted facts conclusively show no importation into New York "for delivery or use" in New York, and no possibility thereof (11a).

From the moment the liquor is "Bottled for export from the U. S. A.", it moves in one continuous progress in foreign commerce through sanctioned channels in furtherance of the national purpose and under constant commitment, control and escort by the United States Government until it is ultimately delivered on foreign soil (10a).

It is incredible that New York, which is wholly unaffected by this liquor, can veto this federally conducted exportation, or that the Twenty-first Amendment could so operate without discovery thereof for the last twenty-eight years. Such prolonged practical construction is convincing of the law. (*Adams Express Co.* v. *New York*, 232 U. S. 14, 30.)

Add the further convincing fact that the New York State Department of Taxation ruled as far back as 1954 that New York is without power to tax sales such as those by the petitioner "at airports within the State of New York." (7a, 26a).

(5) As illustrative and conclusive of the foregoing, we quote the following from the admitted allegations of the complaint (4a, 5a):

> "The bonded, tax-free wines and liquors manufactured and stored exclusively in such bonded warehouses, purchased from the suppliers for export only and sold by the plaintiff from its leased premises for export solely, remain at all times in the constant and

continuous custody, control and supervision of the United States Treasury Department, Bureau of Customs, under Regulations adopted pursuant to Section 311 of the United States Tariff Act of 1930 [19 U. S. C. §1311], as amended, which are designed to, and do, insure against the diversion of the wines and liquors for use in the State of New York or elsewhere in the United States and which continuously insure the export thereof to foreign countries. The elaborate and exhaustive precautionary measures contained in the Regulations which provide such continuous custody and supervision of the wines and liquors and of the plaintiff's operations by the United States Customs Bureau and its officials (a) while in such bonded warehouses, (b) during transshipment therefrom to the premises leased by plaintiff, (c) while in said premises, and (d) during transportation to and loading on the carrier and down to the moment of departure, are contained in the Code of Federal Regulations, Title 19, ch. 1, Parts 18 and 19, and in Regulations adopted pursuant to the applicable provisions of the Internal Revenue Code above referred to, reference to which is hereby made.

None of the wines and liquors sold by the plaintiff have been or can be diverted to use in the State of New York or elsewhere in the country. Class 6 bonded warehouses and United States Customs bonded warehouses are designed exclusively for the storage in bond of wines and liquors, tax free, solely for exportation and are the only classes of warehouses in which these articles, once they have been placed therein, are irrevocably destined for export and from which they cannot ever be legally withdrawn for domestic use or sale or enter domestic commerce even upon tender of taxes and duties, and such Tariff Act and Regulations have been so construed by the Treasury Department, Bureau of Customs, the Federal agency charged with

> their administration and enforcement. Such products constitute exports from the moment they are placed in such warehouses."

See also the further confirmatory allegations on pages 9a-11a, 35a-37a, and pertinent Federal Regulations, Bureau of Customs, 160A-163A.

(6) It must also be borne in mind that petitioner's leased premises are located in the International Airport at Idlewild (2a).

The petitioner's lease is with the Port of New York Authority which, as this Court judicially knows, is a bi-state instrumentality created by New York and New Jersey to develop and coordinate the facilities of commerce (particularly foreign commerce) within a radius of twenty-five miles from the Statue of Liberty. The enabling legislation and the ensuing "Comprehensive Plan" were approved by Joint Resolutions of Congress (42 Stat. 174 [1921] and 42 Stat. 822 [1922]), the first of which stipulated:

> "nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement."

Commerce through this International Airport is under the supervision and control of the Bureau of Customs (160A-163A); and the petitioner's entire leased premises therein are "under the supervision and control of the United States Bureau of Customs both as to its construction and security and as to accountability for liquor exported" (3a, 36a).

(7) Respondents' brief cites no case applying the Twenty-first Amendment to facts in any way resembling the present.

An unbroken line of federal and New York decisions negative their contention.

In *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171, the appellant, an importer and distributor of alcoholic beverages, having been denied by the Secretary of the Treasury the right to import its product into the United States, sued for a declaratory judgment that the Federal Alcohol Administration Act was unconstitutional because of the Twenty-first Amendment. This Court held to the contrary, saying (pp. 172-3):

> "Here, the Federal Alcohol Administration Act was attacked upon the ground that the Twenty-first Amendment to the Federal Constitution gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause, and hence that Congress has no longer authority to control the importation of these commodities into the United States. We see no substance in this contention."

In *C. J. Tower & Sons* v. *United States*, 135 F. Supp. 874, the United States Customs Court, Third Division, held that the holding of the courts, after ratification of the Twenty-first Amendment, that violations of the National Prohibition Act could no longer be prosecuted, was inapplicable to "a statute enacted under the federal power to regulate foreign commerce". The Court said (p. 881):

> "Said 21st amendment did not destroy the power of Congress to regulate foreign commerce, and, irrespective of that amendment, Congress retains its constitutional right to impose conditions upon the importation of intoxicating liquor into the United States."

In *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518, this Court held that, notwithstanding the Twenty-first

Amendment, California could not require a license for the sale of imported beer in a national park which was in the State but under the control of the Federal Government, notwithstanding that the beer had been purchased outside of California and had been transported through it to the Park. This Court said (pp. 536-8):

> "The State makes the point that §2 of the XXI Amendment gives it the right to regulate the importation of intoxicating liquors. * * * The lower court was of the opinion that though the Amendment may have increased 'the state's power to deal with the problem * * *, it did not increase its jurisdiction.' With this conclusion, we agree. * * * Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable."

To the same effect is *Yellow Cab Transit Co.* v. *Johnson*, 48 F. Supp. 594, where the court held that, notwithstanding the Twenty-first Amendment, Oklahoma had no control over the shipment of liquor from Illinois to Fort Sill Military Reservation located in Oklahoma. This decision was affirmed by the Circuit Court of Appeals, 137 F. 2d 274, and by this Court, 321 U. S. 383.

See also *United States* v. *Gudger*, 249 U. S. 373.

In *During* v. *Valente*, 267 App. Div. 383, 46 N. Y. S. 2d 385, the New York Appellate Division of the Supreme Court overruled the contention of the New York State Liquor Authority that the Twenty-first Amendment put under its jurisdiction Portuguese Brandy imported into the United States and stored in the Free Trade Zone of the Port of New York, located in New York City. The Court said (p. 386):

> "By its terms the Amendment grants power to a State to regulate traffic in liquor only to the extent that such liquor is transported or imported for delivery

> or use within such State. The complaint contains no allegation from which it could be inferred that the sale involved the importation of the liquor into the State of New York within the meaning of the Amendment."

This ruling was followed by the same Court in *Rosenblum* v. *Frankel*, 279 App. Div. (1st Dept.) 66, 108 N. Y. S. 2d 6, where the New York Liquor Authority sought jurisdiction over industrial alcohol imported from the Virgin Islands. Said the Court (p. 68):

> "Neither do the regulatory powers of the State Liquor Authority extend to international transactions, even in alcoholic beverages, except sales for domestic consumption in New York State (*During* v. *Valente*, 267 App. Div. 383)."

In *Parrott & Co.* v. *City and County of San Francisco*, 131 Cal. App. 2d 332, 280 P. 2d 881, the court held concerning the Twenty-first Amendment and foreign commerce (280 P. 2d at p. 883):

> "The answer to the main question must be that foreign imported intoxicating liquor, while still in the hands of the importer and in its original packages, is an import which, under the import-export clause, has been made immune to state taxation. In other words, the Twenty-first Amendment did not repeal the import-export clause insofar as intoxicating liquors are concerned."

In the instant case the wines and liquors were always in their original packages, namely bottles labeled "Bottled for export from the U. S. A." (3a).

In *National Distillers Products Corp.* v. *City and County of San Francisco*, 141 Cal. App. 2d 651, 297 P. 2d 61, the court held that liquor imported by a California taxpayer from foreign countries and held by it in San Francisco as

the original importer and in the original package on tax day, was unlawfully subjected to California's personal property tax laws.

In *Board of Trustees* v. *United States*, 289 U. S. 48, this Court said (p. 58):

> "The purpose to regulate foreign commerce permeates the entire congressional plan."

In *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414, this Court said (p. 428):

> "Customs regulations to insure the devotion of the imports to the intended use are likewise within the Congressional power since such regulations are not only necessary or appropriate to protect the revenue, but are means to the desired end, the regulation of foreign commerce by insuring that the particular class of exempted imports are used for the purposes for which the exemption is allowed."

(8) The opinion of the State Attorney General on which the Liquor Authority relies has overlooked these decisions and proceeds on the curious ground that, because the Statute does not authorize or provide for what the petitioner does, illegality must be deduced. But the silence of the Statute is much more reasonably attributable to legislative awareness that it should and could not be made applicable.

A state law which would require a party to take out a state license for carrying on foreign commerce would be unconstitutional. (*Adams Express Co.* v. *New York*, 232 U. S. 14, 31.)

(9) The respondents' brief says (p. 22) that these New York decisions (*During* and *Rosenblum*, *supra*) excluding the reach of the New York Alcoholic Beverage Control Law in cases of foreign commerce are "not binding upon this Court".

Why not? Surely this Court could not and will not undertake to say that a state statute has a reach and an application which the highest courts of the State have decided that it does not have. Otherwise this Court would be legislating for the State and overruling the state courts in a matter of state law.

(10) The decisions cited on pages 18-21 of respondents' brief have no application here.

They all concern *interstate* commerce,—transportation from one state into another for delivery or use in the latter as the place of destination, contrary to the latter's laws.

(11) On page 29 respondents' brief says that, in the interval between the loading and departure of the plane, the liquor is "physically in New York State and concededly under no direct governmental supervision or control". This is not the fact, and there is no such concession (5a, 9a, 10a; Federal Regulations, Bureau of Customs, 159A-163A). Moreover, on the plane the liquor is already in the course of foreign commerce and in transit out from the State of New York.

III

The respondents' reversal of its previous continuous insistence on interim suppression and penalization of the petitioner's business

(1) Another extraordinary innovation in the respondents' brief is that *now for the first time* the Liquor Authority promises no "enforcement proceedings" or "penalties" "until the dispute is settled".

The respondents' brief now *for the first time* makes the following concessions (p. 30):

> "It is conceded also that, by virtue of 28 U. S. C. §2281, the single-judge District Court, has no power

to grant a stay pending abstention. However, we do not hesitate to assure the Court, and we have been authorized by the State Liquor Authority to make such assurances, that the respondents, constituting the State Liquor Authority, will refrain from instituting enforcement proceedings until, or base penalties on conduct occurring before, the dispute is settled. With such assurances there can be no question regarding the adequacy of the State remedy (*Harrison* v. *NAACP*, 360 U. S. 167, 179 [1959])."

This "assurance" is the direct opposite of all preceding actions of the Authority and of the State Attorney General as its attorney, which included threats of immediate civil and criminal proceedings against it and its suppliers (7a, 8a, 39a, 40a).

Before Judge Bicks the Authority, by affidavit of its then Chairman, opposed the petitioner's applications for a preliminary injunction and restraining order (34a, 35a), and asked that all relief (interim and otherwise) "be denied in all respects" (44a-48a).

Before Judge Dimock the Authority maintained its same insistence, which by then had taken the forms of a subpoena duces tecum for all the petitioner's records and of threats to its suppliers to revoke their licenses. (Our prior brief, pp. 15-17.) So likewise before Judge Cashin (128a, 129a).

Nor was any such "assurance" tendered by the Authority in the U. S. Court of Appeals or in its brief opposing the petitioner's application to come here.

(2) Moreover, this last-minute "assurance" is itself so limited as to be utterly incomplete and inadequate.

The "assurance" bears no resemblance at all to the following comprehensive and effective restraining order deemed necessary by Judge Dimock pending the petitioner's appeal to the Court of Appeals (94a, 95a):

"ORDERED that the plaintiff's motion for an order temporarily enjoining and restraining the defendants, from taking any action to hinder, harass or in any manner interfere with the plaintiff or the plaintiff's business during the pendency of the plaintiff's appeal from the decision and order of the Honorable Alexander Bicks herein, dated November 4, 1960, be, and the same hereby is, granted, and the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them are hereby enjoined and restrained from taking any action to hinder, harass, or in any manner interfere with the plaintiff or the plaintiff's business during the pendency of the aforesaid appeal, and it is further

ORDERED that the defendants, their officers, agents, servants, employees, attorneys, and all persons acting in concert with them, are hereby enjoined and restrained from communicating with respect to the plaintiff or the plaintiff's business with any of the plaintiff's suppliers whose names appear in any evidence or testimony which may be obtained from the plaintiff as a result of the aforesaid subpoena *duces tecum.*"

(3) The respondents' brief (p. 31) cites *Harrison* v. *NAACP*, 360 U. S. 167, 179.

But there, as this Court therein observed (p. 179), the defendants had *from the outset* continued to cooperate in withholding any action under the state statutes "until a final decision is reached". Even then three of the Justices of this Court dissented.

It is one thing to have thus cooperated from the outset. It is an altogether different thing to reverse uncompromising militancy and to try to mend a precarious hold when in the court of last resort and much of the damage has already irreparably been done.

(4) Furthermore, the "assurance" is merely by way of attempting to overcome the conceded fact (pp. 30, 31), that, under the State Law, the petitioner would be "limited to a 30-day stay",—a grossly inadequate remedy. (Our prior brief, p. 43.)

The predicate in and for the "assurance" is that the petitioner, contrary to its will and contention, has been forced into the State courts.

IV

The respondents' extraordinary claim as to what is not before this Court

(1) The respondents' brief is also extraordinary for its claim that (p. 4):

> "An essential and integral part of the merits of the instant controversy is not now before this Court."

The respondents seek plausibility for this claim by presenting this suit *as if it were by them* for a judicial determination as to the rightness or wrongness of *their* interpretation of the state law.

The "essential and integral part of the merits of the instant controversy" is, on the contrary, the rightness or wrongness of the respondents' violations of the petitioner's federal rights and sanctions.

That issue in itself supplies one of the several substantial federal questions in the case, and is very much "before this Court."

(2) The respondents' reasoning overlooks that the Attorney General of the State of New York, in the exercise of his powers as the chief law officer of the State, has himself construed the State's Alcoholic Beverage Control Law as condemning as "illegal" what the petitioner is doing un-

der sanction of the federal law; that the State Liquor Authority has adopted this ruling as binding on it; that both the Attorney General and the Authority have proceeded to give it effect disastrous to the petitioner's federally sanctioned business; and that in this very action before this very Court both are now supporting their alleged right so to proceed.

Hence, it does not lie with them to claim as an open question to be first tested in the State courts the very interpretation of the State law which they avow as the sole sanction for their acts destructive of the petitioner's federal rights, or to endeavor to hold off the petitioner from his federal remedies until their actions have been tested in the State courts.

They themselves have precipitated the clash which has created both the federal jurisdiction and the substantial federal question. To paraphrase Judge Dimock (91a), they themselves as officers of the State of New York are proceeding in the name of New York law to destroy as unlawful what "has been ruled by the United States to be lawful foreign commerce".

Hence it is enough for federal jurisdiction and its federal exercise that, as said in *California Commission* v. *United States*, 355 U. S. 534, 538:

> "The Commission has plainly indicated an intent to enforce the Act."

Accord: *Florida Lime Growers* v. *Jacobsen, Director*, 362 U. S. 73, 85; *Collins* v. *Yosemite Park Co.*, 304 U. S. 518; *Hines* v. *Davidowitz*, 312 U. S. 52; *General Electric Co.* v. *Callahan*, 294 F. 2d 60, 65-6.

The choice of forum should be with the petitioner whose federal rights and property are invaded and not be dictated by the invaders.

V

The respondents' erroneous predicates for "discretion"

At page 16 the respondents' brief says:

> "Where, as here, a question under the Federal Constitution is dependent upon the resolution of an uncertain point of State law, the State remedy being adequate, the District Court properly exercised its discretion in invoking the doctrine of abstention."

In this statement all the predicates and the conclusion are in error:

(1) Here the original jurisdiction of the Federal Court arises from the immediate irreparable damage being done by the respondent Liquor Authority on the advice of the State Attorney General to the petitioner's federally created and controlled export business conducted in furtherance of the national and international purposes of Section 311 of the Tariff Act of 1930 and of the reciprocal agreements made thereunder with foreign nations. (Our prior brief, pp. 11, 12.)

(2) Such jurisdiction is not "dependent upon the resolution of an uncertain point of State law", because (a) the national legislation is pre-emptive and exclusive; and because (b) such jurisdiction is "original" in a case such as this and would be operative for the petitioner's protection against the aggressor State officials whether right or wrong in *their* resolution of the meaning of the State law. (*Capital Service, Inc.* v. *Labor Board*, 347 U. S. 501, 504; *Penagaricano* v. *Allen Corporation*, 267 F. 2d 550, 557-8; our prior brief, p. 30.)

As said by this Court in *Campbell* v. *Hussey, Jr.*, in its decision rendered December 18, 1961, 30 U. S. L. Week 4095.

"We do not have here the question whether Georgia's law conflicts with the federal law. Rather we have the question of pre-emption."

(3) The alleged "point of State law" is not "uncertain" at all, but was long ago settled adversely to the respondents by the State's highest courts. Since the State courts have held that the State statute does not reach foreign commerce conducted according to express congressional legislation, the interpretation of some phrase or word in that statute is irrelevant and beside any point here. (Our prior brief, pp. 40-4.)

(4) The so-called "State remedy" is not "adequate". (Our prior brief, pp. 43-5.)

(5) "Discretion" cannot justify refusal of a jurisdiction which exists as a matter of right and was expressly created and imposed by Congress for the very purpose of protecting and enforcing the Constitution, laws and treaties of the United States, and the Acts of Congress in regulation of foreign commerce. (*All American Airways* v. *Village of Cedarhurst*, 201 F. 2d 273, 277; *General Electric Co.* v. *Callahan*, 294 F. 2d 60, 66.)

"Discretion" cannot justify giving to the invader of rights and property the choice of forum.

VI

The respondents' misconceptions of the petitioner's predicates for Federal judicial jurisdiction

(1) Constantly the respondents' brief erroneously assumes that the petitioner predicates jurisdiction in the Federal Court "*solely* on the alleged violation by the State statutes" of the United States Constitution. (See pp. 4 footnote, 6, 12, 16, 34, etc.)

On the contrary, the petitioner predicates such jurisdiction on each and all of the several grounds stated in our prior brief under "Summary of Argument", pp. 19-24, and in Point X, p. 51; and it is entitled to whatever relief the statement of claim justifies irrespective of the wording of the prayer. (F. R. C. P., Rules 8(e)(2) and (f), Rule 54(c) and Rule 57.)

(2) In the present case, the statement of claim presents valid claims and rights to relief under both Sections 1331 and 1337. It is not confined to matter arising "under the Constitution". It also comprehends matters arising "under the laws or treaties of the United States" or under Acts of Congress "regulating commerce".

In point of Federal original jurisdiction the complaint would be entirely sufficient even if the prayer for a statutory court had been omitted.

For example, since the statutory plan embodied in Section 311 of the Tariff Act of 1930 and associated statutes and regulations is *pre-emptive*, the wrongs pleaded as done to the petitioner thereunder are equally as actionable in the district court under 28 U. S. C. §§1331 and 1337, as are the wrongs pleaded as done the petitioner under alleged authority of the State statute in violation of the United States Constitution.

(3) Judge Dimock put the anchorage of this action in both Sections 1331 and 1337 and in all the grounds of jurisdiction therein respectively specified, when he said (91a):

> "Plaintiff certainly raises a serious legal issue when it states that what New York is regarding as unlawful has been ruled by the United States to be lawful foreign commerce."

Such an issue is by the very statement of it not only a substantial but a "serious" federal issue,—one squarely

and literally within *all* the respective grounds of original jurisdiction specified in Sections 1331 and 1337, and within all the rights to relief administrable hereunder.

VII

The respondents' concession "that abstention is inappropriate where the State law is settled"

This concession appears at page 29 and is forced by the cited decisions of this Court.

The respondents' attempt to escape the fatal consequence by contending (p. 29) that, notwithstanding New York decisions cited *supra* and in our prior brief (pp. 41-43) settle *as the law of New York* that its Beverage Control Law is inapplicable to foreign commerce in general and to exports under Section 311 of the Tariff Act in particular, nevertheless there somehow remains open a state question as to whether the word "sales" in the Law would include the petitioner's business.

But, if the applicability of the Law itself to foreign commerce is foreclosed as regards New York by the New York decisions themselves, the meaning of its word "sales" is likewise foreclosed from applicability and, as regards this case, is also irrelevant and moot.

Respectfully submitted,

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SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
FEB 26 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961

No. 138

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

MARTIN C. EPSTEIN, WILLIAM H. MORGAN, ROBERT E. DOYLE, JOHN C. HART, and BENJAMIN H. BALCOM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,
Respondents.

Misc. 180

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

HONORABLE ALEXANDER BICKS, HONORABLE EDWARD J. DIMOCK, HONORABLE JOHN M. CASHIN, JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondents.

ADDENDUM TO BRIEFS OF PETITIONER

Opinion of the Supreme Court of Wisconsin, Filed January 9, 1962, in *State ex rel.* v. *Board of Review*, 112 N. W. 914

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No. 128

AUGUST TERM, 1961

STATE OF WISCONSIN — IN SUPREME COURT

STATE *ex rel.* H. A. MORTON CO., a Wisconsin corporation,
Respondent,

v.

BOARD OF REVIEW, CITY OF MILWAUKEE, *et al.*,
Appellants.

APPEAL from a judgment of the circuit court for Milwaukee county: LEO B. HANLEY, Circuit Judge. *Modified and, as so modified, affirmed.*

Writ of certiorari directed to the Board of Review, City of Milwaukee, *et al.*, challenging an assessment by the city of Milwaukee of personal property tax upon respondent's imported wines and liquors. The H. A. Morton Company is a wholesale liquor dealer owning a warehouse in Milwaukee. It has a federal import license which enables it to import merchandise directly from foreign countries. The company is the exclusive importer and representative in the area for the Twenty-One Brands Company of New York City. Twenty-One Brands Company is the agent for various foreign wine and liquor manufacturers.

Within the warehouse is a metal caged area designated as a "United States Government Bonded Warehouse," established according to federal law. This inclosure is used solely for the storage of the wines and liquors respondent imports on which no duty has been paid.

The Morton Company obtains foreign wines and liquors, hereinafter called liquors, in two ways: One, it purchases direct from Twenty-One Brands in New York City which imports and sells merchandise from its own warehouse. These cases bear the importing license number of Twenty-One Brands. Two, it places an order with Twenty-One Brands which then sends the order to the distiller, who ships the order directly to respondent. At respondent's request the distiller places Wisconsin alcohol tax stamps on the bottles before the cases are closed. Respondent pays Twenty-One Brands for the order and the stamps. Respondent carries the insurance from the time the liquor is placed in the ship. Its importing license number is on the cases.

When the directly-imported liquor arrives in Milwaukee the Morton Company pays no import duty. Under the supervision of customs officials, who retain the key, the liquor is placed in the bonded caged portion of the warehouse. Upon notice to the customs office and payment of duties on any number of cases, a customs official is sent to the warehouse. He allows the cases to be removed from the caged area. There is no restriction as to the number of calls or the amount of merchandise which can be withdrawn from the cage when the duty is paid. Respondent pays the federal government for the time spent by the customs official.

The imported merchandise is stocked separately from the domestic merchandise in the open portion of the warehouse. At the close of business on April 30, 1959, there was $31,862.50 worth of liquor imported by respondent in the caged area on which no duties had been paid. In the open warehouse there was $24,460.66 worth of imported liquor consisting of broken cases imported by respondent in which some bottles had been removed; unopened cases imported by respondent and moved from the caged area after payment of duties; and open and unopened cases purchased from the Twenty-One Brands Company.

The city levied personal property taxes against all of the imported liquors. The Board of Review sustained the assessment and respondent filed a petition for writ of certiorari. The circuit court held for respondent, ruling that the assessment on the liquor still in the original package, unconsigned and unsold, violated the import-export clause of the United States constitution.

Judgment was entered on March 22, 1961, declaring the assessment to be null and void, and the defendants appealed.

Broadfoot, C. J. The issue here is whether merchandise imported for sale and kept on hand by the importer-wholesaler to meet current or anticipated business demand is protected by art. I, sec. 10, clause 2 of the United States constitution from the ad valorem personal property tax.

In *United States Plywood Corp.* v. *Algoma*, 2 Wis. 2d 567, 87 N. W. 2d 481, 358 U. S. 534, 79 S. Ct. 383, 3 L. Ed. 2nd 490, the United States supreme court affirmed the deci-

sion of this court and held that materials imported for use in manufacturing and stockpiled to supply the manufacturer's current operating needs were so taxable. The high court determined that the manufacturer had so acted upon the imported materials as to cause them to lose their distinctive character as imports by irrevocably committing them to use in manufacturing, the purpose for which they were imported.

The appellants here urge that the principles set forth in the *United States Plywood Corp. Case, supra,* be applied to the facts in this case. They contend that the following questions embrace the crux of that decision and that all four must be answered in the affirmative here:

1. Has the importation journey definitely ended?

2. Are the goods imported necessarily required to be kept on hand to meet the current needs?

3. Are the goods actually being used to supply the need?

4. Are indiscriminate portions of the whole actually being used to supply the daily operating needs?

It is not necessary to consider these contentions because the United States supreme court has to the present recognized, as must we, a distinction between goods imported for sale and goods imported for use in manufacturing. Beginning with *Brown* v. *Maryland*, 12 Wheat. 419, 25 U. S. 419, 6 L. Ed 678, that court has held that the import-export clause of the constitution protects goods imported for sale while they are in their original packages and have not been sold or used by the importer. "Use" by the importer of

such goods does not include their storage preparatory to sale. Storage does not cause the goods to lose their character as imports. This is true even if the goods, such as the liquor here, will only be sold for delivery in Wisconsin.

In the *United States Plywood Corp. Case, supra,* the United States supreme court modified the "original package" doctrine of the *Brown Case, supra,* as to unopened stocks of goods imported for use in manufacturing. However, it clearly indicated that it was not abolishing the "original package" doctrine as applied to unopened stocks of goods imported for sale:

> "Whatever may be the significance of retaining in the 'original package' goods that have been imported for sale (cases cited), goods that have been so imported for use in manufacturing are not exempt from taxation, though not removed from the 'original package,' if, as found here, they have been 'put to the use for which they [were] imported.' " (358 U. S. 548, 79 S. Ct. 391).

It may be argued that an ad valorem property tax should be allowed because the tax is not directed towards imports as such and consequently the goods imported are not subjected to any burden as a class. Rather, the imported goods are subjected equally with other domestic property in the state to the tax. This argument was answered in *Low* v. *Austin,* 13 Wall. 29, 80 U. S. 29, 34, 20 L. Ed. 517:

> "* * * But the obvious answer to this position is found in the fact * * * that the goods imported do not lose their character as imports, and become incorporated into the mass of property of the state, until they

> have passed from the control of the importer or been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition. The question is not as to the extent of the tax, or its equality with respect to taxes on other property, but as to the power of the state to levy any tax. If, at any point of time between the arrival of the goods in port and their breakage from the original cases, or sale by the importer, they become subject to state taxation, the extent and the character of the tax are mere matters of legislative discretion."

It is suggested by appellants that the Twenty-first amendment to the United States constitution permits taxation in this case. The argument is made that since that amendment has given the state control over importation of liquor for use and sale solely within the state, the state can tax the liquor. This ignores the fact that under the authorities cited above the protection afforded imported liquor here has not ceased. The liquors are still imports and are protected by the import-export clause. The Twenty-first amendment is not inconsistent with the import-export clause and does not repeal it in so far as intoxicating liquors are concerned. *Parrott & Co.* v. *City and County of San Francisco,* 131 Cal. App. 2d 332, 280 Pac. 2d 881.

It is our determination that: (1) The liquor imported directly by the Morton Company, whether inside or outside of the bonded warehouse area, not sold or consigned, and still in the original, unopened cases or containers, can not be taxed; (2) the liquor imported by the Morton Company is taxable if the original cases or containers in which it arrived have been opened even though it had not been sold

or consigned; (3) the liquor imported by Twenty-One Brands and sold to the Morton Company is subject to the tax.

Some of the merchandise was improperly assessed. This requires that the entire assessment be set aside. That properly taxable may be reassessed by the proper authorities of the city of Milwaukee as omitted property. See *Central Cheese Co.* v. *Marshfield*, 13 Wis. 2d 524, 109 N. W. 2d 75. The judgment declared that the entire challenged assessment was null and void. The record does not support that statement.

Judgment modified to conform to the opinion and, as modified, it is affirmed. Gordon, J., not participating.